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THE judgment of the English Court of Appeals, in what is known as the Clitheroe Case, has caused great commotion in that country, especially in legal circles, where it has met with severe criticism. For the first time in the history of England, the rights and privileges of a wife have been broadly asserted, and the power of the husband over his wife's person has been distinctly limited in a manner which would no doubt surprise Blackstone and the old text writers. The proceeding was by way of *habeas corpus* on the part of a Mrs. Jackson, directed to her husband, requiring him to bring his wife, "now detained by him," before the court, with a view of determining whether she was actually imprisoned by her husband, and if so, by what right. The substance of the return of the writ was, that Mrs. Jackson was the lawful wife of Mr. Jackson, but had refused to live with him, and consequently he had taken and detained her in his own house, using no more force or restraint than was necessary for the purpose of so taking and detaining her, in order to have full opportunity of gaining her affections. The court, consisting of Lord Chancellor Halsbury, Master of the Rolls Esher, and Lord Justice Fry, gave judgment for the wife in long and well-considered opinions. The body of English matrimonial law has not for a long time been enlarged by so important a decision. The time honored *dicta* of English legal text books were dismissed by the lord chancellor as "quaint and even absurd." Whatever these *dicta* might be, "there was no case to be found anywhere establishing the proposition that the mere relation of husband and wife gave the husband complete dominion over the wife's person, when her behavior was unaccompanied either by misconduct or the approach of a proximate act of misconduct." "No English subject in fact had a right," said Lord Halsbury, "to imprison any other subject who was *sui juris*, whether she be wife or anybody else." The legal pith of the case may be stated thus: A husband has no right to restrain the liberty of his wife's person in the absence of any other injury or reasonable cause to apprehend other injury to him than mere loss of her society.

This decision came like an awful shock to those conservative Britons who still believe that wife beating is a not highly objectionable form of domestic discipline, and has met with severe criticism at the hands of some legal journals. The *Law Journal* says: "Perhaps never in the history of judicial decisions has authority been so boldly overruled and disregarded." And the *Justice of the Peace* thinks that "this judgment is certainly equally deficient in legal reasoning." And the *Solicitor's Journal* says: "We may be permitted to draw attention to the singular irony of fate, which has left it to a lord chancellor whose political, religious and social connections have been hitherto understood to have been moulded on those of Lord Eldon, to declare for the first time, that, according to British law, a wife is at liberty, immediately after going through the ceremony of marriage in church, to desert her husband, and without any excuse to condemn him to a life of celibacy; that the continuance of the marriage relation is perfectly voluntary, and that the husband may, for no fault of his own, be deprived of a home and the prospect of children to inherit his name." And many other journals and lawyers of prominence in that country are taking violent exceptions to a decision which alters very materially the common notions respecting the absolute subjection of the wife and her person to the husband's will.

In our judgment, the court of appeals in the above decision has placed the personal liberty of married women on a proper and sure foundation, and in accordance with humanity and common sense. If it is not in accordance with law, it ought to be. The lord chancellor declared that no such right as that claimed by Mrs. Jackson's husband had ever at any time existed in English law. Whether this be so or not, the judgment in Mr. Jackson's case must very naturally modify such an exposition of the common law, and has performed a public service in dealing the death blow to the widely-spread idea, sustained by many *dicta* in the law books, that a mere relation of husband and wife gives the husband a complete dominion over the wife's person.

In this country, such a doctrine has never been maintained, and under the same circumstances would probably be denied, though the question has not directly arisen. This may, in part, result from the fact that the statutes of most of the States provide a remedy by divorce to a husband who has been deserted by his wife. And the Jackson decision simply means that eventually the law of England will have to be so amended. As it stands today, without such an amendment, an English husband is unfortunately situated. Under the Jackson decision he cannot recapture his wife, nor attach her, nor has he the right to the custody of her person or to her society. Neither can he obtain divorce upon the ground of misconduct and desertion, for legal misconduct it is not, according to English law. On the whole, the Jackson judgment may be regarded as the charter of the personal liberty of the married woman in England, and is as far reaching in its effects as any of the equitable doctrines and statutory enactments which secure her in the enjoyment of her property rights and render her subject to the liabilities incident thereto.

NOTES OF RECENT DECISIONS.

ASSIGNMENT FOR BENEFIT OF CREDITORS—PREFERENCE — FRAUDULENT CONVEYANCE — PROOF OF CLAIM.—There has, of late, been quite a crop of cases involving questions of assignment for benefit of creditors. In Vorhees v. Carpenter (Ind.), 26 N. E. Rep. 838, a creditor sought to maintain a suit to set aside a fraudulent conveyance made by his debtor, where the latter had afterwards assigned all his property for the benefit of his creditors, and where the trust had been executed and the assignee discharged, though neither the assignee nor the creditor had any knowledge of the fraudulent conveyance till after the assignee's discharge. The court denied the remedy upon the ground that an assignment vests in the assignee the right to set aside fraudulent conveyances, that a creditor might, in a case of this kind, bring suit to reopen the trust or secure the appointment of a new trustee, by which the property is made available for the benefit of all the creditors, but that no creditor can subject property which ought to have been included in the trust and upon which a trust character has been impressed, to sale for the payment of his own debt. Many cases are cited in the exhaustive opinion by Elliott, J.

In Rochester v. Armour (Ala.), 8 South. Rep. 780, and in John Shillito Co. v. McConnell (Ind.), 26 N. E. Rep. 832, we have presented a question of similar character to that which, in some measure, perplexed the United States Supreme Court in the now well known case of White v. Cotzhausen, 28 Cent. L. J. 334, wherein it was held, construing an Illinois statute and following Illinois precedent (Preston v. Spaulding, 120 Ill. 208), that when an insolvent debtor transfers all or substantially all his personal property to a part of his creditors in order to provide for them in preference to other creditors, the instruments by which such transfers are made, whatever their form, will be held to operate as an assignment, and consequently void under the statute forbidding preferences in an assignment. It will be remembered that the Illinois courts have since repudiated the doctrine of White v. Cotzhausen, claiming that it was not the law of that State; and holding that under such circumstances as above, a preference is not void unless it be actually written in an assignment, and is treated as void as being a part thereof (Farwell v. Nilson, 29 Cent. L. J. 129, 345, 515), a conclusion which we took occasion at the time to criticise. The doctrine of the United States Supreme Court has long been the interpretation placed upon a similar statute in Missouri (Kellogg v. Richardson, 19 Fed. Rep. 70; Krebs v. Ewing, 22 Fed. Rep. 693; Freund v. Yageman, 26 Fed. Rep. 812), and has recently been upheld by the Supreme Courts of Dakota (Straw v. Jenks, 43 N. W. Rep. 941), and South Carolina (Putney v. Freisleben, 11 S. E. Rep. 337). Of the cases to which we first called attention, the Alabama one adopts the conclusion of White v. Cotzhausen, holding that under Code Ala. § 1737, providing that every general assignment made by a debtor by which a preference or priority of payment is given to one or more creditors, shall inure to the benefit of all the creditors equally, the general creditors of an insolvent debtor are entitled to share equally in his property with *bona fide* creditors in whose favor he has confessed judgment in contem-

plation of and just prior to a general assignment. The court remark of Preston v. Spaulding, 120 Ill. 208, whose view they adopt, that "its moral tone is high, and the ruling tends to promote honesty and fair dealing, and to the healthful enforcement of beneficent remedial legislation called into existence by the behests of legitimate commerce. The world cannot be too often told that in judicial administration, as in morals, that which cannot be accomplished directly cannot be attained by indirect means." The Alabama court give no evidence, in their opinion, that they were aware that the Illinois court had in the later decision of Farwell v. Nilson, repudiated this healthful doctrine of honesty, so extolled by the first mentioned court. The Indiana case (John Shillito Co. v. McConnell), to which we also called attention, adopts the later Illinois doctrine, refuses to follow the early Illinois case (Preston v. Spaulding), and regards the rule as laid down in Gilbert v. McCorkle, 110 Ind. 215, as correct on principle. The exact holding is that a mortgage made by an insolvent to secure some of his creditors does not become part of a general assignment afterwards made by him, so as to constitute an unlawful preference, even though the mortgage is made just before the assignment, and after the insolvent has determined on making the assignment. But such a mortgage, when made contemporaneously with the assignment, is void as an unlawful preference. In the midst of such conflicting views the interested student may easily take his choice.

A somewhat novel question of assignment arose in *In re* Meyer (Wis.), 48 N. W. Rep. 55, where it was held that where both the maker and indorser of a note assign for the benefit of their creditors, after the note has become due, and the indorser has been charged with its payment, the holder may prove his claim against the estate of each severally for the full amount due. The court is asked to repudiate the general rule as thus laid down by many authorities, upon the ground that it is a new question before this court, and that it is opposed to both reason and equity. After an exhaustive examination of the authorities, and a discussion of the question upon principle, the conclusion is that the rule is neither inequitable nor unjust, and is abundantly sustained by logic and reason. The opinion abounds with learning and great research.

Another case on the same general subject is Commercial National Bank v. Colton (R. I.), 21 Atl. Rep. 349, where it is held that since a debtor may at any time before an assignment for the benefit of his creditors mortgage his property by way of preference for an existing debt, one who takes such a mortgage, and, to aid the mortgagor's credit, keeps it from record until just before his assignment, is not thereby estopped from enforcing his lien as against the mortgagor's general creditors.

INSOLVENT CORPORATIONS—ATTACHMENT BY DIRECTOR.—The New York Court of Appeals, in Throop v. Hatch Lithographic Co., 26 N. E. Rep. 742, make a narrow and somewhat questionable construction of a recent statute of that State, which is intended to prevent preferences, by insolvent corporations, to its officers or directors. It is there held that an attachment against an insolvent corporation by a creditor, who is one of its directors, though he has no control over its assets, and though the proceeding is strictly hostile as between him and the corporation, is void under Rev. St. N. Y. pt. 1, ch. 18, tit. 4, § 4, which prohibits a corporation which shall have refused the payment of any of its debts or any of its officers from assigning or transferring any of its property or *choses in action* to any officer or stockholder of such company, directly or indirectly, for the payment of any debt, and which renders void any such assignment or transfer to such officer or stockholder, or for their benefit. The court thinks that a construction which disables an officer of an insolvent corporation from acquiring a preferential lien on the corporate assets by legal process is justified by the language of the statute, and will tend to prevent frauds upon it. Kingsbury v. Bank, 31 Hun, 329. Three of the judges dissented from the view of the court.

REMOVAL OF CAUSES—NON-RESIDENT DEFENDANTS—COUNTER-CLAIM—JURISDICTIONAL AMOUNT.—Judge Jenkins, in the United States Circuit Court for Wisconsin, in the case of La Montague v. Harvey Lumber Co., 44 Fed. Rep. 645, decides that the filing of a counter-claim in the State court by a non-resident de-

fendant does not change his standing as defendant in the action, so as to preclude him from availing himself of the right to remove the cause to a federal court, conferred on non-resident defendants by the removal act, disapproving, in terms, of the ruling in Lumber Co. v. Holtzclaw, 39 Fed. Rep. 578. It is also held that the claim of the plaintiff can alone be considered as the "matter in dispute," within the meaning of the removal act; and, where plaintiff's claim is for less than $2,000, defendant's petition for the removal of the cause must be denied, though he has filed a counter-claim against plaintiff for a sum exceeding $2,000.

RAILROAD COMPANY—ACCIDENTS AT CROSSINGS—DAMNUM ABSQUE INJURIA.—The Supreme Court of Illinois, in Williams v. Chicago & A. Ry. Co., 26 N. E. Rep. 661, decide that negligently omitting to whistle or ring a bell when approaching a crossing, as required by Rev. St. Ill. 1889, ch. 114, § 54, does not render the company liable to a farmer who is plowing in his field near the crossing, and who is injured through his horses taking fright at the train, since the statutory requirement is only intended for the benefit of travelers on the highway. Magruder, J., says:

The question presented for our consideration is whether or not the plaintiff has a right of action based upon the negligence of the company in not ringing the bell or blowing the whistle; in other words, did the company owe it as a duty to the plaintiff to comply with the statutory requirement above specified? In order to justify a recovery, it is not sufficient to show that the defendant has neglected some duty or obligation existing at common law or imposed by statute, but that the defendant has neglected a duty or obligation which it owes to him who claims damages for the neglect. O'Donnell v. Railroad Co., 6 R. I. 211. It has been said: "However great the defendant's negligence, if it was committed without violating any duty which he owed either directly to the plaintiff or to the public, in a matter whereof he had a right to avail himself, * * * there is nothing which the law will redress." Bish. Non-Cont. Law § 446. In Shear. & R. Neg. (4th Ed.) § 8, the doctrine is thus expressed: "If the defendant owes a duty, but does not owe it to the plaintiff, the action will not lie." It is a fair construction of section 68, as above quoted, that the duty there imposed upon railroad companies was intended to be for the benefit of travelers upon the public highways. If it were not so, why is the bell required to be rung or the whistle sounded at a certain distance from "the place where the railroad crosses or intersects a public highway?" The place here indicated is the intersection of a railroad with a public highway, and the persons whose safety and protection are contemplated by this phraseology are those who use the highway, and those who are passengers upon the passing train. Similar provisions exist in the statutes of other States, and the uniform current of authority is in favor of the construction that the requirement is for the benefit of travelers upon the highway. In some of the cases the obligation to ring the bell or blow the whistle exists where the grade of the railroad track and that of the highway are on the same level; in others, where the track is upon a bridge raised above and over the highway. In some of the cases it is held that the duty of giving the signal is exacted in order to protect travelers from actual collision with passing trains; in others, in order also to enable them to secure their horses against taking fright at the trains when they pass. In one case the railroad company was held liable to one who had passed the crossing; in another case to one traveling upon a highway parallel with the track towards a highway crossing the track. But in all these cases the person who has the right of recovery is a person who is on the highway, either at the crossing or elsewhere. Wherever the hazard to be provided against is the danger of damage by the frightening of teams, the teams are those which are traveling upon the public highway at or near the crossing. The view here taken is sustained by the following authorities: 1 Thomp. Neg. p. 352, § 15; Harty v. Railroad Co., 42 N. Y. 468; O'Donnell v. Railroad Co., 6 R. I. 211; Holmes v. Banking Co., 37 Ga. 593; Wakefield v. Railroad Co., 37 Vt. 330; Railroad Co. v. Barnett, 59 Pa. St. 259; Ransom v. Railway Co., 62 Wis. 178, 22 N. W. Rep. 147; Railway Co. v. Payne, 29 Kan. 166; Evans v. Railroad Co., 62 Mo. 49. It is manifest that the plaintiff in the present case did not belong to the class for whose benefit the railroad companies are required to give the signal. Unquestionably the defendant neglected its duty, but it neglected no duty which it owed to the plaintiff, under the circumstances set up in the declaration. Plaintiff was not traveling upon the highway, either at the crossing, or before reaching the crossing, or after passing the crossing. He was not even upon a highway running parallel with the track. He was plowing on the farm near the railroad right of way.

FOREIGN CORPORATIONS — VALIDITY OF FRANCHISE—COMITY—ESTOPPEL.—The ruling of the Texas Court of Appeals in Empire Mills v. Alston Grocery Co., 15 S. W. Rep. 505, is an interesting construction of a late statute of that State applicable to foreign corporations. It is there held that Acts Tex. 1885, authorizing the organization of mercantile corporations, is a direct prohibition against the operation of foreign corporations in that State, and the rule of comity does not extend so far as to render valid the charter of such a corporation obtained in another State for the sole purpose of evading the law of and of doing business in Texas. Such a corporation being absolutely prohibited from doing business in that State, a creditor who deals with them as a corporation is not thereby estopped from denying their corporate capacity, and he may hold them liable as

partners. On the main question the court says:

In this motion for rehearing appellees contend that, by a rule of comity a corporation organized in one State is permitted to transact business in other States, "unless such rule of comity is expressly repealed;" and that "this repeal will not be implied from the fact that, in the State where such corporation seeks to do business, a corporation for like purposes could not be organized;" and virtually that the power of a State to "repeal this general rule of comity does not extend to foreign corporations," etc. If appellee be correct, then the rule of comity would be superior to the statutory provisions of the State where the corporation was seeking to do business. Appellee states his proposition in advance of and beyond what we understand the law to be. "A corporation is the creature of a statute immediately creating it, or authorizing proceedings for its organization." "The powers of a corporation, under statutes, are such, and such only, as the statutes confer." Suth. St. Const. § 382; Mor. Corp. § 4, and notes; 4 Amer. & Eng. Enc. Law, p. 206, and notes, and collated authorities on pages 206-209. All the authorities on the subject agree that such is the law. Again, it may be said in this connection that "it is a fundamental principle that the laws of a State can have no binding force, *proprio vigore*, outside of the territorial limits and jurisdiction of the State enacting them." Mor. Corp. (1st Ed.) § 500; Story, Confl. Laws, § 7: Sedg. St. & Const. Law, 69. "Hence it follows that a State cannot grant to any person the right to excercise a franchise in a foreign State or country; for a franchise is the result of a law authorizing particular individuals to do acts or enjoy immunities which are not allowed to the community at large." Same authority. See, also, Mor. Corp. § 535. "A grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. It must dwell in the place of its creation, and cannot migrate in another sovereignty. The recognition of its existence, even by other States, and the enforcement of its contracts made therein, depend purely upon the comity of those States." Mor. Corp. (1st Ed.) § 500; Bank v. Earle, 13 Pet. 588; Runyan v. Coster, 14 Pet. 1:9, 130; Railway, etc. Co. v. Coffey Co., 6 Kan. 252; Thompson v. Waters, 25 Mich. 221; Railroad Co. v. Glenn, 28 Md. 287; Land Co. v. Laigle, 59 Tex. 339, Wright v. Bundy, 11 Ind. 398; Miller v. Ewer, 27 Me. 509; Merrick v. Van Santvoord, 34 N. Y. 208, 220; McCall v. Manufacturing Co., 6 Conn. 428, 435, note *a;* Paul v. Virginia, 8 Wall. 181; Smith v. Alvord, 63 Barb. 423. The rule of comity is entirely in subjection to the sovereign will of the State, and can only exist by permission of the State in which it is sought to employ it. A corporation has no implied authority to do any act in a foreign State which is not permitted by the laws of the latter to individuals generally. Mor. Corp. (1st Ed.) § 505, and note 1. Speaking of the limit of the rule of comity, the same author says: "By the common law, the right of acting in a corporate capacity is not accorded freely and without conditions to every one, but must be derived from an act of the legislature. It is evident that there are reasons of public policy underlying this restriction, and it cannot be assumed that its effect may be nullified by the comity extended towards foreign States. To obtain a charter for the purpose of evading the laws of a foreign State, under cover of the rule of comity would be a fraud upon the State granting the charter; and to attempt to act under such charter in the foreign State would be a fraud upon the latter." Mor. Corp. (1st Ed.) § 508. Comity was never accorded for the purpose of giving any State an unlimited power to dispose of the franchise of acting in a corporate capacity in other States, or to "spawn corporations" for that purpose. Railway, etc. Co. v. Coffey Co., 6 Kan. 254. No rule of comity will allow one State to charter corporations to operate in another State unless there is willingness on the part of the foreign State that it should be so. To hold otherwise would be to say that the right of one State, aided by comity, is superior to the sovereign will of the other. This involves the surrender of sovereignty to a rule of comity, and to a matter of international etiquette, which no independent nationality should for a moment think of doing. It is not necessary that a State should by express enactment exclude foreign corporations in order to indicate that they shall not be allowed to act within its jurisdiction; the will of the State may be implied from its general policy and legislation. "Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made." Bank v. Earle, 13 Pet. 592; Myers v. Bank, 20 Ohio 301, 302; Starkweather v. Society, 72 Ill. 50; Trust Co. v. Lee, 73 Ill. 144; Christian Union v. Yount, 101 U. S. 356. In this last-cited case Mr. Justice Harlan, speaking of the rule of comity, said: "In harmony with the general law of comity obtaining among the States composing the Union, the presumption should be indulged that a corporation of one State, not forbidden by the law of its being, may exercise within any other State, the general powers conferred by its own charter, unless it is prohibited from so doing, either in the direct enactments of the latter State, or by its public policy to be deduced from the general course of legislation, or from the settled adjudications of its highest court." Page 356 of said case. See Tayl. Corp. "Having Capital Stock," § 384. (In accordance with these principles, see authorities collated in note to above-cited section. They are too numerous to cite here.) Therefore an act of incorporation, procured for the purpose from one State to evade the laws of another State, and to carry on its business in the latter State, would constitute it a fraud upon the State granting the corporate powers, as well as upon the State in which it is sought to organize and operate the corporation. It is equally well settled that the corporation cannot exercise its corporate powers in the foreign State when it is prohibited from doing so by direct enactment of the legislature of that State; it is also as well settled that the act of incorporation cannot be put into operation there if the will of the State can be implied from its general policy and legislation, nor can it exercise its powers therein if the settled adjudications of the higher court of the State are adverse thereto.

FORMER JEOPARDY, FORMER CONVICTION, AND FORMER ACQUITTAL.

I.

It will be apparent from the authorities hereinafter cited that no general rule can be laid down which will govern all cases that may arise under either of these defenses in criminal actions. The authorities on these subjects are in inextricable confusion, and cannot be reconciled. For instance, text-books may state the better rule to be that a conviction in a municipal court, for an act which is an offense against the by-laws and ordinances of the municipality, is not a bar to a conviction by a State court for the same act, it being also an offense against the laws of the State, on the ground that one act may be an offense against the laws of each jurisdiction, and, therefore, punishable by each; in other words, because one act may constitute two offenses. This is the rule laid down by Judge Cooley,[1] and the weight of authority undoubtedly sustains the text. In the case of the State v. Lee, it was held that "the same act, prohibited by both the city and the State, may constitute two offenses which are intrinsically and legally distinguishable, and a prosecution and conviction under a city ordinance constitute no bar to a prosecution for the same act by indictment under the general statutes."[2]

Many cases, however, hold that the enforcement of such ordinances would oust the State courts of jurisdiction, or make the same offense punishable twice, and that they are therefore contrary to the constitution and invalid.[3] But an acquittal in a State court on a prosecution by the State for assault and battery will not protect the accused from subsequent trial and conviction in a municipal police court, under a city ordinance, upon a charge of disorderly conduct in fighting, though the same transaction and state of facts are involved in both trials.[4]

Thus it will be seen that, under a constitutional provision that "no person shall be put in jeopardy twice for the same offense," the courts of some States hold that one act may constitute two offenses, and the offender be twice punished therefor, while others hold that one act constitutes one offense only, and that, if the offender has been once punished by one jurisdiction, he cannot be again convicted and punished by the other.

On a careful reading of the constitutional provision referred to above, without any hair-splitting legal distinctions, it would appear that the intention of the framers thereof was that no one should "be put in jeopardy twice" for the doing of any one particular act. Municipal corporations are simply the creatures of the statutes of the State wherein they exist. All the power and authority which they can exercise must be delegated to them by the legislature. Their charters are construed strictly against them,[5] and they cannot legally perform any act which they have not been empowered to perform. Again, a corporation cannot be legally authorized to do anything which would be in conflict with or contrary to the constitution of the United States, or the constitution or laws of the State which creates it. The question then arises: Can the State, by legislation, make one act constitute two offenses, each punishable by its own courts upon conviction? and,

[1] Cooley's Const. Lim. 199.

[2] 13 N. W. Rep. 913, s. c., 29 Minn. 445. See, also, Town of Van Buren v. Wells (Ark.), 14 S. W. Rep. 38; State v. Thornton, 37 Mo. 369; State v. Welch, 36 Conn. 216; Moore v. People, 14 How. 13; Mayor v. Allaire, 14 Ala. 400; Hughes v. People, 8 Colo. 536, s. c., 9 Pac. Rep. 50; Wragg v. Penn Tp., 94 Ill. 11; Ambrose v. State, 6 Ind. 351; Town of Bloomfield v. Trimble, 54 Iowa, 399; Williams v. Warsaw, 60 Ind. 457; Shaffer v. Mumma, 17 Md. 331; Wayne Co. v. Detroit, 17 Mich. 399; State v. Oleson, 26 Minn. 507, s. c., 5 N. W. Rep. 959; State v. Bell, 5 N. W. Rep. 970; St. Louis v. Bentz, 11 Mo. 61; St. Louis v. Cafferata, 24 Mo. 95; Linneus v. Dusky, 19 Mo. App. 20; City of Kansas v. Clark, 68 Mo. 588; City of Brownsville v. Cook, 4 Neb. 101; Howe v. Treasurer, 37 N. J. Law, 145; State v. Bergman, 6 Oreg. 341; State v. Sly, 4 Oreg. 277; State v. Williams, 11 S. C. 288; Greenwood v. State, 6 Baxt. 567; State v. Taxing District, 16 Lea, 240; Hamilton v. State, 3 Tex. App. 643; McLaughlin v. Stephens, 2 Cranch C. C. 148; U. S. v. Wells, *Id.* 45; U. S. v. Holly, 3 *Id.* 656; Brizzolari v. State, 37 Ark. 364; Kemper v. Com., 3 S. W. Rep. 159, s. c., 85 Ky. 219. The majority of these cases are cited and relied on in the case of Town of Van Buren v. Wells, *supra*.

[3] *In re* Sic, 14 Pac. Rep. 405, s. c., 73 Cal. 142; Jenkins v. Thomasville, 35 Ga. 145; Mayor v. Hussey, 21 *Ib.* 80; Adams v. Albany, 29 *Ib.* 56; Vason v. Augusta, 38 *Ib.* 542; Reich v. State, 53 *Ib.* 73; Foster v. Brown, 55 Iowa, 686, 8 N. W. Rep. 654; Washington v. Hammond, 76 N. C. 33; State v. Lansington, 88 N. C. 692; State v. Brittain, 89 N. C. 574; State v. Keith, 94 N. C. 933; *Ex parte* Smith, Hemp. 201; *Ex parte* Bourgeois, 60 Miss. 663; all cited in 14 S. W. Rep. 38. See also, Huffsmith v. People, 54 Am. Rep. 550, s. c., 8 Colo. 175, and State v. Powell, 29 Mo. 330.

[4] McRea v. Mayor, 59 Ga. 168, s. c., 27 Am. Rep. 390.

[5] Robertson v. Groves, 4 Oreg. 210.

if it cannot, can it authorize one of its creatures to enact an ordinance which would make an act, punishable under the general laws of the State, punishable also as an offense against such ordinance, and thus constitute an offense against the State law and against the law of municipal corporation also? The authorities answer the first proposition embraced in this question in the negative, but the weight of authority answers the latter branch thereof in the affirmative, thus substantially establishing as law that a State can do indirectly that which it cannot do directly. But it does seem that, when a State, by legal enactment, authorizes and empowers a municipal corporation, under and by virtue of its charter and the ordinances passed thereunder, to punish any given act as an offense, it ought to be held to waive its right to punish the same act as an offense against its laws, and ought to be estopped to do so. "The word offense has no technical meaning in modern law, but it is commonly used to signify any public wrong, including, therefore, not only crimes or indictable offenses, but also offenses punishable on summary conviction."[6] And among the synonyms given by Webster I find "misdemeanor," "sin" and "crime."

The time-honored adage that "a man cannot do two things at one time" must be relegated to the dead and forgotten past if one act can constitute two offenses and subject a defendant to two punishments therefor.

There is, it seems to me, less excuse for holding a conviction for a misdemeanor in a recorder's court to be a bar to a prosecution for a felony in a State court; yet in the case of Powell v. State,[7] the Supreme Court of Alabama said: "The larceny charged in this case, and the subject of it—a lady's dolman or wrap—was the same in each prosecution. The theft, which was the main ground of conviction before the recorder, is the identical crime charged in this case. For that crime the defendant has been convicted and punished. Can he be again convicted and punished for that crime, merely because it was attended by an aggravated circumstance, pretermitted or disregarded in that trial, but insisted on in this? The aggravation is not itself a crime, but standing alone is inoffensive. The larceny is the criminal act in each case, the place of its commission determining only the degree of crime. Considered in its lesser degree, it was within the recorder's jurisdiction, and a conviction before him is a bar to further prosecution for the same offense before circuit or city court;" and cite as authority for the conclusion reached, Moore v. State.[8]

If any good reason can be given for this, it seems to me that it is that the defendant, having been once convicted and punished for the minor offense, could not be put upon trial for the greater crime because the minor would be included in the greater, and he might be found not guilty of the graver offense charged in the indictment, but found guilty of the lesser offense. And, unless it be held that the former conviction is an absolute bar to any further prosecution, why could not the court charge the jury that, if they were not satisfied "beyond a reasonable doubt" that the defendant was guilty as charged, but satisfied that he was guilty of the less offense, but that he had already been tried and convicted therefor, they should return a verdict of not guilty of the offense alleged in the indictment, and that, although guilty of the less offense, they sustained the plea in bar thereto? If this could be done, the court could then order the defendant to be discharged from custody, and no injustice would result to the prisoner.

So far as courts of record or courts of general jurisdiction are concerned, all of these questions might be treated as one in substance; for it would be wholly immaterial whether or not the prisoner had been fully fairly tried upon a valid indictment and acquitted or convicted, or some act had been done by the court or jury, or both, which in law would operate as an acquittal. The result would be the same in either case. The most difficult question to determine is, "what action on the part of the court, with reference to the jury and the trial, will constitute an acquittal or a bar to any further prosecution?"

Take, for instance, the two opinions filed by Sherwood, J., (of Missouri), in the case of State v. Snyder, the one filed June 24th,

[6] 2 Rapalje & Lawrence Law Dictionary, 894.
[7] 8 South. Rep. 109.
[8] 71 Ala. 307. See also State v. Smith, 13 S. W. Rep. 391, and Mason v. State, 14 S. W. Rep. 71.

1889,[9] and the other filed Nov. 5th, 1889.[9a] In this case Snyder was indicted for assault with intent to ravish. On the trial the jury returned a verdict of guilty, and assessed his punishment at *six months in jail*. This verdict was set aside by the court of its own motion and a new trial ordered. On the second trial the defendant interposed the plea of *autrefois convict*, which, being overruled, he excepted. The second jury found him guilty and assessed his punishment at *five years in the penitentiary*. Defendant was taken to and confined in the penitentiary, but appealed. Between the two trials, however, he was confined in the jail, and a writ of *habeas corpus* refused. A defendant can avail himself of a conviction, though judgment has never been entered thereon, as it is not his fault that judgment is not properly entered, and the default of the court should not be permitted to prejudice him.[10] Here the defendant appealed only from the judgment rendered on the second verdict. No appeal was taken from the order of the court setting aside the first verdict and ordering a new trial, and the first verdict was one which the jury had a right to find, and which the court had no authority to set aside. Yet, although the Supreme Court held that "a new trial, after a verdict in a criminal case has been set aside by the court of its own motion, is in contravention of art. 2, sec. 23 of Missouri Bill of Rights, which provides that no person can, for the same offense, be again put in jeopardy of life or liberty," and further held, "if the defendant on an erroneous judgment has submitted thereto and performed the sentence of the law, it is agreed that he could not again be punished, and the reason given for this conclusion is that he might have brought a writ of error and reversed the judgment, but that he could waive this course, and, if waived, the performance of the sentence was an answer to any further liability arising from the same facts; in a word, if he made no objection to the erroneous and reversible proceedings, the State could not waive the objection for him, and punish him over again. Having paid his debt to the State, such payment was the end of the law,"[11] it ordered the first verdict to be reinstated. The court thereupon reversed the judgment of the lower court, and ordered the prisoner to be discharged.

In the opinion filed Nov. 5, 1889,[12] the judgment was reversed, and the court made the following order: "And an order herein will be entered in this court expressly commanding the judge of the criminal court of Jackson county that, on receipt of a copy of said order, he (said judge) do forthwith reinstate the original verdict in this cause as of the date the same was returned and set aside, to-wit, the 16th day of September, 1887; and that, this being done, he (the said judge) do forthwith enter sentence and judgment thereon as of said date last aforesaid."

It is true that, under the statute, the court had no authority, of its own motion, and without the consent of the defendant, to set aside the verdict, and, probably, the State might have appealed from that order, but it did not do so, and the defendant only appealed from the judgment of the court entered on the second verdict and sentencing him to the penitentiary for five years; therefore, it seems that, unless the supreme court possessed extraordinary and unusual powers, such court had no authority to order the reinstatement of the first verdict and a judgment thereon. Said order was not excepted to, was not appealed from, and the question as to whether or not it should be reinstated was not properly before the court. But a verdict of guilty, set aside on defendant's motion, is no bar to a further prosecution on a new indictment for the same offense; nor is it error to proceed upon such new indictment while the former is still pending.[13] And an improper verdict rendered on a trial on a valid indictment, from which the defendant has been relieved by the court on a motion for a new trial and one in arrest of judgment, does not operate as a bar to a further prosecution of the accused upon the same indictment.[14]

On a trial for forging an order for the payment of money, evidence that the defendant had increased the amount for which it was drawn by the insertion of an additional figure

[9] 11 S. W. Rep. 1036.
[9a] 12 S. W. Rep. 369.
[10] 11 S. W. Rep. 1036.
[11] 11 S. W. Rep. 1037.
[12] 12 S. W. Rep. 369.
[13] 21 N. E. Rep. 525, 127 Ill. 507.
[14] State v. Oliver, 2 South. Rep. 194, s. c., 39 La. Ann. 470; Robinson v. State, 4 S. W. Rep. 904.

will sustain a conviction under an indictment charging him with forging the entire instrument; and, after a withdrawal of the case from the jury, defendant cannot again be tried under another indictment charging him with having forged the order by increasing its amount.[15]

On an indictment for bigamy in marrying M W, it appeared on the trial that M W had, before her marriage with defendant, married one S, and been divorced, and was known both as M W and M S. For this reason the jury was discharged by the court *sua sponte* after part of the evidence for the commonwealth had been received, and defendant neither consented nor objected, but was silent, and it was held that, on a subsequent trial on a new indictment for bigamy in marrying M S, a plea of former jeopardy was good.[16]

A person is placed in jeopardy, under the constitution of Mississippi, art. 1, sec. 5, declaring that "no person's life or liberty shall be twice placed in jeopardy for the same offense," whenever, upon a valid indictment, in a court of competent jurisdiction, before a legally constituted jury, his trial has been fairly commenced; and if the jury be afterwards unlawfully discharged, without his consent, before rendering a verdict, it operates as an acquittal, and shields the prisoner from further prosecution or trial for the same offense."[17]

Where on appeal from a conviction the judgment is set aside and vacated, and the district attorney thereafter and before further proceedings enters a *nolle prosequi*, though this does not amount to an acquittal of the offense, defendant is entitled to be released on the complaint, at least until some step is taken to recall the *nolle prosequi* and revive the complaint;[18] and where a *nolle prosequi* was entered without the prisoner's consent after issue was joined and the jury were sworn, it will bar a subsequent indictment for an assault with intent to murder, when the first indictment alleged that offense and was good and sufficient for a simple assault, even if not so for the aggravated assault charged. There can be no second jeopardy as to either grade of assault, and, as the major includes the minor, the second indictment comprehends the same simple assault of which the accused was acquitted on the first indictment.[19]

A verdict of acquittal, on the trial of an indictment for burglary in the house of J C N is no bar to a trial on a new indictment for burglary in the house of R N.[20] In the case of State v. St. Clair,[21] the defendants were jointly indicted for burglary and larceny in a single count. The case went to a jury, who returned a verdict finding them guilty of larceny. The judge directed the clerk not to file the verdict, and requested the jury to return and consider the case again, and find a verdict according to the instructions given them; at the same time he reminded them that the court had not submitted to them for their finding, whether the defendants were guilty of larceny or not, as an independent offense, and that their finding was not responsive. The jury again retired, but failing to agree upon another verdict, they were discharged by the court and a new jury empaneled, by whom a verdict of guilty of burglary and larceny was rendered. Upon this state of facts it was held that the verdict of the jury first rendered was legal and valid, and the defendants could not again be put in jeopardy by a new trial under the same indictment, and that defendants' plea of *autrefois convict* of larceny and *autrefois acquit* of burglary, should have been sustained. In this case, also, the court ordered that "the judgment and decree appealed from be annulled, set aside; that the former verdict finding the defendants guilty of larceny be reinstated; and that the cause be remanded for further proceedings according to law."[22] Yet it is perfectly apparent that the first verdict was before the appellate court only as evidence to sustain the defendants' plea of former acquittal of burglary and former conviction of larceny, and appellate courts are not in the habit of reviewing the action of the lower courts to which no exception has been taken. A conviction under an indictment that fails to charge the venue of the offense,

[15] Colliver v. Com., 13 S. W. Rep. 922.
[16] Robinson v. Com., 11 S. W. Rep. 210.
[17] Helm v. State, 6 South. Rep. 322.
[18] Com. McCluskey, 25 N. E. Rep. 72, s. c., 12 Crim. Law Mag. 1002.
[19] Franklin v. State, 11 S. E. Rep. 876, s. c., 12 Crim. Law Mag. 1004.
[20] State v. Brown, 11 S. E. Rep. 641.
[21] 7 South. Rep. 713.
[22] 7 South. Rep. 714.

which was added by amendment after the testimony was closed and argument begun is void, and is not a bar to a subsequent prosecution for the same offense;[23] and the discharge of a jury in case of manifest necessity, such as the sudden sickness of a juror, the illness of the prisoner, or other urgent cause, will not exempt the prisoner from again being tried for the same offense;[24] but defendant having been tried under an indictment for selling mortgaged property, consisting of a cow, a calf and 900 pounds of cotton, and having been found "guilty of removing 500 pounds of cotton," the verdict and judgment entered thereon constitute an acquittal, and a bar to further prosecution as to all the charges, except as to the 500 pounds, though set aside at his instance.[25] Of course, where the judgment is arrested on motion of defendant, or a new trial granted at his request, he has never been in jeopardy as to the offense for which he was convicted.[26]

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[23] Donley v. State, 11 S. E. Rep. 659.
[24] Ellis v. State, 6 South. Rep. 768.
[25] Foster v. State, 7 South. Rep. 185.
[26] Gibson v. State, 7 South. Rep. 376.

MUTUAL BENEFIT SOCIETY — LIFE INSURANCE—BENEFICIARY—CERTIFICATES.

CHARTRAND V. BRACE.

Supreme Court of Colorado, February 13, 1891

1. Under a certificate providing that upon the death of a member the insurance shall be paid to his wife, and in case of her death to his children, the right to the fund vests in the surviving wife immediately upon the death of the husband, and upon her death the fund passes to her administrator. Elliott, J., dissenting.

2. A certificate of membership in a mutual benefit society is to be regarded as a written contract of life insurance, and like a policy of life insurance, is in the nature of a testament, and in construing it the courts will, so far as possible, treat it as a will.

In September, 1886, the Ancient Order of United Workmen, a secret society organized and established for the purpose, among other things, of insuring the lives of its members, issued to one Sterling D. Rouse, a member, of the order, a certificate of insurance in the following words and figures omitting the formal parts, to-wit: "This certificate, issued by the authority of the Supreme Lodge of the Ancient Order of United Workmen, witnesseth: that Brother Sterling D. Rouse, a master workman degree member of Centennial State Lodge, No. 8 of said order, located at Boulder, in the State of Colorado, is entitled to all the rights and privileges of membership in the Ancient Order of United Workmen, and to participation in the beneficiary fund of the order to the amount of two thousand dollars, which sum shall at his death be paid to his wife, Ella A. Rouse, and, in case of her death, to Mary E., Clara D. and Anna L. Rouse, children. This certificate is issued upon the express condition that said Sterling D. Rouse shall in every particular, while a member of said order, comply with all the laws, rules, and requirements thereof." On December 30, 1886, said Sterling D. Rouse died, leaving his said wife and children him surviving. In less than one month thereafter, January, 28, 1887, and before any portion of the insurance money had been paid to the wife, she also died. Appellee, Brace, having been appointed administrator of said Ella A. Rouse commenced this suit in the county court against the Order of United Workmen, to recover the insurance, as part of said Ella's estate. The children named in the certificate also claimed the benefit of the insurance. The defendant appeared, and requested to be permitted to deposit said sum of $2,000 "subject to the order of the court, according to the very right of the case;" and it was accordingly so ordered, and the defendant was dismissed as a party. Mary E. Chartrand, formerly Mary E. Rouse, Clara D. Rouse and Anna L. Rouse, minors, (said last two appearing by John H. Nicholson, their guardian), were substituted as parties to the action in place of defendant, for the purpose of enabling them to assert in this action their claim to the insurance money. Judgment having been rendered in the county court, the action was appealed to the district court, where an amended answer was filed in behalf of said children and their guardian, claiming the insurance money. The amended answer shows *inter alia*, that the children named in the certificate of insurance are the children of said Sterling D. Rouse by his first wife, who died many years before; that they were his only children, and with his said wife, Ella, were the only members of his family dependent upon him for support; that his said wife Ella, was, and had been for years, an invalid, and left no surviving children. The amended answer further shows: "That said Grand Lodge of the A. O. U. W., is a voluntary beneficiary association, not incorporated; that its constitution and laws in force at the time said Sterling D. Rouse became a member, and when he died, provided among other things that the beneficiary or beneficiaries named in the certificates issued to members should be confined to one or more of the family of the members, or some person or persons related to him by blood, or who shall be dependent upon him; that the amount of the beneficiary certificate upon the death of its members shall be collected by assessments upon its members, the assessment to be made upon the first day of the next month after receiving notice from the recorder of the lodge of which the deceased was a member, and payment by the mem-

bers is voluntary, and cannot be enforced, except by suspension of the members; that notice of the death of said Sterling D. Rouse was received by the grand recorder of the said Grand Lodge of the A. O. U. W., January 11, 1887; that the assessment to pay the beneficiaries named in his certificate was not in fact made until and on March 1, 1887, and the money to day the same was not collected and in the treasury of said grand lodge, and proper officer ready to draw warrant and pay the same, until the 27th day of March, 1887." Upon motion of the administrator, the district court rendered judgment upon the pleading in his favor, from which judgment this appeal is taken.

Hayt, J.: The amended answer admits, by failing to deny, the facts as stated in the complaint, and, for the purposes of appeal, the new matter set up in this answer must be taken as true. Upon these facts, the position of appellee is that upon the death of the insured the right to the fund vested absolutely in the wife, Ella A. Rouse, and that upon her death the right to the uncollected fund passed as part of her estate to her administrator, to be by him disposed of as other assets of the estate. The contention of appellant is that, as the fund had not been paid over or collected at the time of the death of the wife, the right thereto became vested in the children, under the terms of the policy. The certificate is, in legal contemplation, a policy of life insurance, and to be construed as such. That the amount only be collected by assessment upon members of the association, after due notice of death, and the payment of such assessment is purely voluntary, can make no difference. The association, so far as it is engaged in the business of life insurance, must be treated in law as a mutual life insurance company. The certificate is to be regarded as a written contract, and, so far it goes, it is the measure of the rights of all parties. Bolton v. Bolton, 73 Me. 299; Com. v. Wetherbee, 105 Mass. 149; State v. Asssociation, 18 Neb. 281, 25 N. W. Rep. 81; Wiggin v. Knights of Pythias, 31 Fed. Rep. 122; Knights of Honor v. Nairn, 60 Mich. 44 26 N. W. Rep. 826; Insurance Co. v. Horner, 14 Colo. 391, 23 Pac. Rep. 788.

Turning to the policy executed in this case, we find the disposing clause to be couched in the following language: "Which sum shall, at his death, be paid to his wife, Ella A. Rouse, and, in case of her death, to Mary E., Clara D., and Anna L. Rouse, children." It would be difficult to find language to more clearly and definitely fix the time at which the right to this money vested in Ella A. Rouse than the words "at his death." It is claimed, however, that the words following "in case of her death, to Mary E., Clara D., and Anna L. Rouse, children," qualify the words immediately preceding, and that, when construed together, they give to the children a right to the fund so long as the same is capable of practical identification and control and has not been otherwise appropriated by the wife, although the wife in fact survives the husband. But the plain intent of the language of the policy is against such construction. The words, "which sum shall at his death," fix the time at which the right to the fund is to be determined and the words following provide for the payment to the children in case the wife shall not be living at that time. The children were only to receive the money upon the happening of certain contingencies. The risk taken by the association was upon the life of the assured. By his death the policy became fixed, and the right to the fund vested. The wife having survived the husband, her right became absolute by the express terms of the policy. This construction finds support not alone in the language of the contract, but is also in accordance with the settled policy of the law, which is to favor vested, rather than contingent, estates; the first, rather than the second taker. King v. Trick (Pa.), 19 Atl. Rep. 951; Smith's Appeal, 23 Pa. St. 9; Womrath v. McCormick, 51 Pa. St. 504; Felton v. Sawyer, 41 N. H. 202; 2 Redf. Wills, *253: Association v. Montgomery, 70 Mich. 587, 38 N. W. Rep. 588.

A policy of life insurance is in the nature of a testament, and, although not a testament, in construing it the courts will so far as possible treat it as a will. Bolton v. Bolton, *supra*. In King v. Trick, *supra*, an absolute devise was made by a father to his son, followed by a proviso to the effect that, in case the devisee should die without children, grandchildren, or wife, living, the estate should go over. The words "die without children," etc., were held to refer to the death of the son in the life-time of the testator, and the son, having survived the testator, was declared the owner of the fee. The case of Association v. Montgomery, *supra*, is in some respects quite analogous to the case at bar. It was provided by the certificate issued in that case that the insurance should be paid to the son and daughter of the insured equally, if living, and, if not living, to his heirs; in case of the death of either the son or daughter, the full amount was to be paid to the survivor; and the court held the provision as to survivorship related to the time of the death of the donor. And it appearing that both beneficiaries were living at that time, although one had died before the payment of the benefit, his executor was entitled to the share, and not the survivor. In the course of the opinion of the court said: "The scheme of the corporation is to raise a fund which shall pass to designated beneficiaries at the death of a member. The right, which before was inchoate and contingent, becomes upon the death of the member fixed and certain in the beneficiary. * * * The time of payment provided for, namely, 30 days after the death of the member, has no reference to who shall take as survivor." So, in the case at bar, we are of the opinion that by the express terms of the policy, the right to the fund became vested in Ella A. Rouse upon the death of her husband. Consequently, upon her death,

the fund should pass to the administrator as a part of her estate. There is nothing in the constitution or by-laws of the association, as pleaded, to change this result. Whatever rights, if any, may have been reserved to the society by these instruments, have been waived by it, and the fund deposited subject to the order of the court. While we feel that our conclusion as to the party entitled to the fund must necessarily follow as a matter of law, in answer to the argument of counsel based upon the duty of the deceased father to provide for his children, it may be said that it was equally his duty to provide for his invalid wife. She was the person having the strongest claim upon his estate and bounty. If the construction contended for by counsel be adopted, the wife could not use the fund, no matter to what extremity she may have been driven in the final sickness intervening between the death of her natural and legal protector and her own death. She could not, by anticipating the payment of the legacy, surround herself with the things that might have been absolutely necessary to sustain her life from day to day. In addition to this, it would place the beneficiary primarily entitled to the fund to a great extent within the power of the insurer. For instance, by withholding payment, the beneficiary would be compelled to bring suit for the money, the ultimate decision of which might be delayed for years; and if, during the time, the wife should die others would receive the reward of her endeavors without sharing the expense. Under such circumstances, it is easily to be seen that the insurance corporation or association could compel the wife in many instances to accept less than the face of the policy, rather than institute a suit, no matter how clear her right of recovery might be. We think the judgment of the district court is right and is accordingly affirmed.

NOTE.—The principal case, though upon a policy of life insurance, or more strictly speaking, certificate of membership in a mutual benefit society, involves an interesting question of construction, which applies equally to the subject of wills. The fact that one of the principal members of the court, dissented from the conclusion of the majority, is evidence that there are two sides to the question involved. The main question in the case is, of course, whether upon the facts the amount in controversy should go to the administrator of the deceased wife, who dies shortly after the death of her husband, and before the collection and payment over of the assessment, or to her step-children, where the terms of the certificate recite that the "sum shall at his death be paid to his wife, Ella A. Rouse, and in case of her death to Mary E., Clara D., and Anna L. Rouse, children." Though, as a matter of strict construction, the amount would seem to have vested absolutely in the wife upon the death of her husband, and therefore is an asset in the hands of the administrator, there is some reason for agreeing with the view of the dissenting member of the court that, while the certificate is to be construed as a contract, nevertheless it being in the nature of a policy of insurance—a *post-mortem* provision for the benefit of those dependent upon the assured for support—it is, like the provisions of a will, to be liberally construed in favor of those who may naturally be presumed to have been the object of their father's bounty. As urged by the dissenting judge, in order to correctly understand and give effect to the contract over which this controversy has arisen, certain rules for the interpretation and construction of written instruments should be considered. First, should be considered, the intention of the husband and father in effecting the insurance, and this is to be ascertained from the language of the certificate itself, construing its words according to their common and reasonable signification. Secondly, the language of the instrument is to be construed in the light of extrinsic circumstances attending its execution, considering the situation and relation in life of the several parties therein mentioned, and the objects and interests to be thereby secured. The claim of the administrator is based upon the words of the certificate, that the money shall "at his death be paid to his wife, Ella." But these are not the only words of the instrument relating to that subject. It also contains the words "case of her death," being a further provision for the vesting of the same in case of the death of the wife and mother. There is ground for saying that the argument on behalf of the administrator, "violates the elementary rule for the construction of contracts, in that it does not give effect to the whole language of the instrument." It is true the certificate was framed so that the wife's right vested immediately upon her husband's death, but it may be said that such right was not indefeasible, and that it was subject to be divested by her own death. The provision for the payment to the children is in no way limited or qualified as to the time of her death. It is direct and unequivocal to the effect that in case of the wife's death, the money shall be paid to the children named in the certificate. The intention may therefore be detected that, in the event of the wife's death at any time while the insurance money should be unpaid, so as to be capable of practical identification and control, it should be paid to the children, thus giving them the greatest advantage that could arise from such a contingency, and so long as the fund should not be otherwise appropriated by the wife. In that way, effect may be given to the entire certificate without doing violence to its obvious meaning, or to any of its words. The cases cited in behalf of the administrator's claim do not necessarily militate against this construction. In Richmond v. Johnson, 28 Minn. 447, 10 N. W. Rep. 596, the wife only was named as the beneficiary in the certificate. In Insurance Co. v. Burroughs, 34 Conn. 305, the policy was made payable to the children only, in case the wife should die before her husband's death should occur, and in Chapin v. Fellows, 36 Conn. 132, the policy contained a similar provision. In both of the Connecticut cases the wife died before the husband. In the former case, the wife had made an absolute assignment of her interest in the policy for a valuable consideration, but the children were allowed to recover against the claims of the creditors of the husband. Thus, as Judge Elliott says: "It appears how jealously the rights of beneficiaries of such insurance, even in the second degree, are guarded by the courts." An examination of the books does not reveal any case where the provisions of the policy or certificate of insurance or of a will were identical, or so near analogous to the one under consideration as to affect the conclusion here. An eminent author, upon the construction of instruments of this character, says: "Pre-

cedents ought never to be allowed an arbitrary and unbending control of any case not precisely analogous; we might say, not strictly identical. And while all analogies, however remote, must be, and should be, allowed to have their just and proper weight, and the more weight in proportion to the nearness of the analogy, in determining future cases, we ought never to forget that mere analogies never rise above the character of the assistants. We should not, therefore, allow ourselves to become slaves to them." Again after adverting to the fact that the English courts follow precedents in matters of this kind more strictly than do the American tribunals, the same author adds: "But, at the same time, when cases occur, as will always be the fact in regard to the largest proportion, which have to be determined upon their peculiar circumstances, the English courts manifest no reluctance to grapple with the difficulties which present themselves, however formidable or embarrassing, and to place all cases upon their proper basis of truth and justice, without regard to the entire want of precedent to maintain them, * * * and the same tendency is observable in decisions of the American courts." 1 Redf. Wills, p. 423.

The majority of the court place great reliance upon the case of Association v. Montgomery, 70 Mich. 587, 38 N. W. Rep. 588. That case is neither "precisely analogous" nor "strictly identical" with the one here considered. There the certificate was upon the life of Edward C. Franklin, payable ninety days after satisfactory proof of his death, and the concluding clause was as follows: "The said Union Mutual Association agrees to pay to his son and daughter, N. Lyon and Charlotte A. Franklin, equally—in case of death of either, full amount to go to the survivor—$1500.00 if living; if not living to the heirs of said member." Both beneficiaries were living at the death of the assured. Satisfactory proofs of the death of the assured were made and both beneficiaries claimed payment of their respective moieties. But before the money was paid one of the beneficiaries died, leaving a will by which his interest in the certificate was disposed of. The court held that the words "if living" and "if not living" refer to living at the time of the assured's death, and that the share of each beneficiary vested absolutely at the death of the assured for the reason that the policy of the Michigan statutes favors vested estates in preference to contingent ones, unless an intention appears to the contrary. In that case, therefore, it was necessary to construe the words "if living" and "if not living" with reference to some particular date or event connected with the vesting of the fund specified in the certificate. No such necessity exists in the principal case for the certificate contains no such or equivalent words; so that whether the wife be living or not living at the death of the assured, the direct and unequivocal provision of the certificate is that "in case of her death" the money shall be paid to the children named therein. Judge Hiliott's opinion shows that the rule relied upon by the majority of the court, that the law favors vested estates in preference to contingent ones, is not fairly violated by a construction which has in view the further rule that the intention of the parties creating an estate is to be considered in determining its character. Reading the certificate in the light of extrinsic circumstances and considering the condition of the assured and of the different members of his family, and the relation they sustained to each other at the time of effecting the insurance, there is at least reasonable ground for the argument that it was the father's intention that the insurance money should be paid to his infant daughters in case the invalid wife should die either before his own death should occur, or before the money should be paid to her. These children were his legitimate heirs, dependent upon him for support, and next after his wife, the natural objects of his bounty. They were not the children of his wife Ella, and could not inherit from her; hence his prudent foresight, as well as fatherly care in causing their names to be inserted as beneficiaries in the certificate contingent upon his wife's expected death. If anything further were needed to strengthen this construction, the objects, purposes, rules and regulations of the benevolent order from which this certificate of insurance emanated might be considered. It is at least not necessary to invoke authority to confirm the view, and it is reasonable to believe, (notwithstanding that the strict rules at law may render a different construction necessary), that it was the father's real intention in case of his wife's death, that the insurance money should go to his doubly orphaned minor children instead of the administrator of the deceased wife, either for the payment of her debts or for the benefit of her heirs, who were to him as strangers having no special claim upon his fortune, his benevolence, or the fruits of his labor. See Henry v. Thomas, 118 Ind. 27, 20 N. E. Rep. 519.

RECENT PUBLICATIONS.

PATTISON'S FORMS FOR MISSOURI PLEADING.

It seems sufficient to call the attention of Missouri practitioners to this book, as its nature and value will be readily understood. It will be found to contain satisfactory forms of pleadings in all cases within the jurisdiction of Missouri courts, including forms for petitions, answers, replies, judgments, of proceedings subsequent thereto and in miscellaneous proceedings, condemnation, divorce, alimony, etc. A large portion of the book is devoted to forms in extraordinary proceedings—attachment, *certiorari*, garnishment, *habeas corpus*, injunction, *mandamus*, mechanic's lien, prohibition, *quo warranto*, replevin and also miscellaneous forms, useful in assignments, homesteads and the taking of depositions. The name of the compiler, Mr. E. W. Pattison, is a sufficient guarantee that the work has been carefully and properly done. The book contains nearly 400 pages, and is well indexed and printed.

FINCH'S INSURANCE DIGEST.

This book will be found useful, especially to those interested in the subject of insurance law. It embraces the decisions of the Supreme and Circuit Courts of the United States, of the supreme and appellate courts of the various States and foreign countries upon disputed points in fire, life, marine, accident, and assessment insurance, for the year 1890, with reference also to annotated insurance cases and leading articles in law journals on insurance. It is well prepared and arranged by its editor, John A. Finch, whose experience in the line of insurance law well fits him for the work. The book has 200 pages and is completely indexed.

BOOKS RECEIVED.

WILLS AND INTERSTATE SUCCESSION, a Manual of Practical Law. By James Williams, B.C.L., M.A., of Lincoln's Inn, Barrister-at-Law, Fellow of Lincoln College, Oxford. London: Adam and Charles Black; Boston: Little, Brown & Co. 1891.

JETSAM AND FLOTSAM.

EXCEPTION TO THE RULE IN FLETCHER V. RYLANDS.—The decision in Fletcher v. Rylands (L. R. 1 Ex. 265, 3 H. L. 330), has been regarded as making a new division in the law of torts, one in which liability arises without negligence. The owner of land who accumulates or brings upon it a body of water or any thing which, if it should escape, would cause damage to his neighbor was held to do so at his peril and to be liable for the consequences. A student at a law school not far off was asked what were the exceptions to the rule and he answered tersely and not incorrectly: "The act of God, the public enemy and rats." Can anyone tell us what decision he had vaguely in his mind when he said rats?—*New Jersey Law Journal.*

QUERIES ANSWERED.

QUERY NO. 8.

(*To be found in Vol. 32 Cent. L. J. p. 367.*)

The right to sell property not held for a public purpose, is an incidental power inherent in all corporations, public or private, unless *withheld* by the law under which they are organized. 2 Dillon Mun. Corp. (3d ed.) 575; same, old edition, sec. 445. And this, whether real or personal. The right being expressly granted in Utah, can there be any question about it?

W. H. B.

HUMORS OF THE LAW.

During a breach of promise case heard in Indiana recently, the counsel on both sides chattered considerably about the "fire of love," "Cupid's flames," "the burning passion," etc. The jury brought in a verdict that both plaintiff and defendant were guilty of arson, and recommended them both to the mercy of the court.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCOUNT STATED—Reasonable Time.—An account rendered, which has at the end the usual initials "E. & O. E." will become a stated account if not objected to within a reasonable time, with like effect, in every respect, as if it did not contain those initials.—*Fleischner v. Kubli*, Oreg., 25 Pac. Rep. 1086.

2. ADMINISTRATORS.—Though Code Tenn. § 2202, provides that letters of administration shall be granted in the county in which the intestate resided, the revival of a suit in the name of an administrator cannot be contested on the ground that his intestate did not reside in the county in which his letters were granted.—*Eller v. Richardson*, Tenn., 15 S. W. Rep. 650.

3. ADMINISTRATORS.—Where one receives money due an intestate's estate, an administrator afterwards appointed may affirm his act, and sue as for money had and received to his use, since his title relates back to the time of the intestate's death.—*Dempsey v. McNabb*, Md., 21 Atl. Rep. 378.

4. ADMINISTRATORS—Sale—License.—Pub. St. Mass. ch. 142, § 18, does not apply where a sale is made without such license; and a sale of more than enough land to pay the debts of the estate, on a license to sell only enough, is void as being without license.—*Gregson v. Tuson*, Mass., 26 N. E Rep. 874.

5. ADMIRALTY—Assault on Seaman — Master.— The master of a vessel is not liable for personal injuries inflicted on a seaman by the mate before the master could interfere.—*Mellor v. Cox*, U. S. D. C. (S. Car.), 45 Fed. Rep. 115.

6. ADVERSE POSSESSION.—In trespass to try title defendant claimed title by adverse possession. It appeared that, after he had taken possession of the land, and within the statutory period, he executed an instrument reciting that he held the land under a third person. Afterwards defendant repudiated the transaction, and posted notices: *Held*, that defendant's possession was not continuously hostile, but was interrupted by the acknowledgment of title in such third person.—*Robinson v. Bazoon*, Tex., 15 S. W. Rep. 585.

7. ANIMALS—"Keeper" of Dog.—In an action for personal injuries from the bite of a dog alleged to have been kept by defendant: *Held*, that the question whether defendant was the keeper of the dog was for the jury, and not the court. — *Whittemore v. Thomas*, Mass., 26 N. E. Rep. 875.

8. APPEAL—Jurisdictional Amount.—Want of jurisdiction to entertain an appeal cannot be waived or cured by consent of the parties.—*Bldg. & Invest. Ass'n v. City of Denver*, Colo., 25 Pac. Rep. 1091.

9. APPEAL—Justice's Court.—Where a defendant allows judgment to go by default in justice's court, he cannot, on appeal, plead a former recovery for a part of the same cause of action.—*Harrison v. Gulf, etc. Ry. Co.*, Tex., 15 S. W. Rep. 643.

10. APPEAL—Record—Service of Notice.—The record of a case on appeal must affirmatively show that the notice of appeal was filed with the clerk below, and served upon the adverse party or his attorney, within the time required by the statute.—*Tootle v. French*, Idaho, 25 Pac. Rep. 1091.

11. ASSAULT AND BATTERY—Arrests.—An officer has a right to strike a man or use necessary force in attempting to disarm him and prevent a breach of the peace.—*Patterson v. State*, Ala., 8 South. Rep. 756.

12. ASSIGNMENT FOR BENEFIT OF CREDITORS — Preferred Claim—Repeal.—Elliott's Supp. § 1398, which provides that all debts due any person for manual or mechanical labor shall be a preferred claim in all cases

where the debtor's property passes into the hands of an assignee or receiver, was not repealed by implication by section 1605, *Id.—Eversole v. Chase*, Ind., 26 N. E. Rep. 835.

13. ATTACHMENT—Sufficiency of Writ.—A writ of attachment cannot be held insufficient on appeal because of an alleged recital therein, where it is not shown by bill of exceptions, and the only thing that appears is an objection by counsel, in which he recites a portion of the writ.—*Davis v. Baker*, Cal., 25 Pac. Rep. 1108.

14. BASTARDY— Evidence. —On prosecution for bastardy, evidence of other acts of sexual intercourse than the act claimed by relatrix to have resulted in pregnancy is admissible to show the relations existing between her and defendant.—*Ramey v. State*, Ind., 26 N. E. Rep. 818.

15. CARRIERS—Limiting Liability.—A provision in a contract of shipment that any action thereon must be brought within 40 days after the damage shall have occurred is waived where defendant carrier, by promising to pay plaintiff's claim, if made for a reasonable amount, induces him to delay bringing suit until after the expiration of the 40 days.—*Gulf, etc. Ry. Co. v. Trawick*, Tex., 15 S. W. Rep. 568.

16. CARRIERS—Passenger on Street-car—Negligence.—It is not negligence *per se* to ride on the platform of a street-car, though there is room within.—*Upham v. Detroit City Ry. Co.*, Mich., 48 N. W. Rep. 199.

17. CARRIERS—Passengers—Degree of Care.—Where a passenger brings an action to recover for injuries resulting from the derailment of the train on which he was riding, and therein shows the occurrence of the accident and the extent of his injuries, a *prima facie* case is made out in his favor, and the burden is thrown upon the railway company to show that the injury did not result from a want of care upon its part.—*Southern Kan. Ry. Co. v. Walsh*, Kan., 26 Pac. Rep. 45.

18. CARRIERS OF GOODS—Act of God.—The sudden and unprecedented overflow of a river is such an act of God as will relieve a railroad company from liability for damage to freight, caused thereby, if, after knowledge of the danger, they did not unnecessarily expose it, but made all effort to save it.—*Smith v. Western Railway of Alabama*, Ala., 8 South. Rep. 754.

19. CARRIERS OF PASSENGERS — Contributory Negligence.—A passenger who is injured while getting off a train while in motion, after he has been warned not to do so by other passengers, cannot recover.—*Kilpatrick v. Pennsylvania R. Co.*, Penn., 21 Atl. Rep. 408.

20. CONSTITUTIONAL LAW— Appropriation — Bonds.—Chapter 236 of the Session Laws of 1887, being an act to authorize Mound City Township, in Linn county, to vote bonds to reimburse citizens of the township for sums advanced to aid in the construction of a courthouse, is not unconstitutional.—*Creager v. Snyder*, Kan., 26 Pac. Rep. 21.

21. CONTRACT—Consideration.—The relinquishment of a right to a homestead entry on public land, and the dismissal and withdrawal of a written protest against the final proof of another, is a good and valid consideration in a written instrument for the payment of money.—*Pelham v. Service*, Kan., 26 Pac. Rep. 29.

22. CONTRACT — Damages. — Where plaintiff entered into a contract with defendant under which plaintiff was licensed to cut timber on defendant's land, the latter to furnish him with supplies during the continuance of the contract where defendant knew that plaintiff was unable to obtain supplies elsewhere and that his failure to furnish them would seriously embarrass him in the prosecution of his work, the measure of damages for failure so to furnish supplies is the difference between the quantity of logs which he could have procured had defendant furnished the necessary supplies and the amount of logs actually produced. — *Skagit Lumber Co. v. Cole*, Wash., 25 Pac. Rep. 1077.

23. CONVERSION—Waiver of Tort.—When the plaintiff in an action has converted certain property of the defendant's to his own use, the defendant may waive the tort, and claim the value of the property converted as a counter-claim, if growing out of the same transaction, or plead it as a set-off, and recover on the implied promise.—*Deisher v. Gehre*, Kan., 26 Pac. Rep. 8.

24. COUNTIES—Town Purchase.—Under Rev. Stat. Wis. §§ 1339, 1079, where the town clerk refuses to obey the direction of the county clerk to so enter the cost of repairs of town bridges, *assumpsit* for the amount thereof will not lie against the town, but the proper remedy is *mandamus* to compel the clerk to make the entry.—*Waupaca County v. Town*, Wis., 48 N. W. Rep. 13.

25. COUNTY AUDITOR—Compensation.—The fact that services performed by a county auditor may be regarded by him and by the board of commissioners as "extra services" does not warrant the latter in allowing him compensation beyond that provided for by statute. —*Board of Commissioners v. Johnson*, Ind., 26 N. E. Rep. 821.

26. CRIMINAL EVIDENCE—Abortion — Dying Declarations.—St. Mass. 1889, ch. 100, providing that in criminal prosecution for abortion under. Pub. St. Mass. ch. 207, § 9, the dying declarations of the woman shall be admissible in evidence, does not apply to prosecutions for abortion committed before its passage.—*Commonwealth v. Homer*, Mass., 26 N. E. Rep. 872.

27. CRIMINAL EVIDENCE— Good Character.—On trial for murder, an instruction that "where the evidence, outside of the presumption of good character, is clear and explicit, on which no doubt can be cast, good character will only cause the jury to hesitate and think about the matter," is erroneous, in that it limits the effect of good character to doubtful cases.—*People v. Hancock*, Utah, 25 Pac. Rep. 1093.

28. CRIMINAL EVIDENCE—Murder.—On a trial for murder by poisoning, it is not essential to a conviction to establish the death by poisoning by a chemical analysis of the stomach of deceased, as the cause of death may be proved by circumstantial evidence, and without the aid of expert testimony.—*Johnson v. State*, Tex., 15 S. W. Rep. 647.

29. CRIMINAL LAW—Appeal from Justice.—To effect an appeal in a criminal trial before a justice of the peace, upon a judgment of conviction the appellant must, within 24 hours after the rendition of the judgment, enter into a recognizance to the State, in the sum and with sureties to be fixed and approved by the justice before whom the trial was had.—*State v. Leigh*, Kan., 26 Pac. Rep. 59.

30. CRIMINAL LAW—Cruelty to Animals.—Under Act Pa. March 29, 1869, § 1, a member of a gun club, who, at a pigeon-shooting match, shoots at and wounds a pigeon set loose from a trap, which is immediately killed on discovery of its wounded condition, is not liable.—*Commonwealth v. Lewis*, Penn., 21 Atl. Rep. 396.

31. CRIMINAL LAW—Homicide—Jury.— Where, on indictment for murder, the evidence does not show circumstances which are made by statute conclusive of murder in the first degree, an instruction that, if the testimony is believed, the prosecution has made out a case of murder in the first degree, by showing premeditation, deliberation, and malice, is erroneous.—*People v. Chew Sing Wing*, Cal., 25 Pac. Rep. 1099.

32. CRIMINAL LAW—Judgment — Appeal.—Defendant, who was charged with burglary and with a former conviction of grand larceny, both of which charges he denied by his plea, and against whom was rendered a verdict for burglary only, may be sentenced to imprisonment for both offenses, where, on the day of the trial, he withdrew his denial of the conviction of larceny.—*People v. Johnson*, Cal., 25 Pac. Rep. 1116.

33. CRIMINAL LAW—"Standing Aside" — Jurors.—The right of the commonwealth to "stand aside" jurors may be exercised on trials for both felonies and misdemeanors, and applies equally to jurors brought in on a special *venire*.—*Commonwealth v. O'Brien*, Penn., 21 Atl. Rep. 385.

34. CRIMINAL PRACTICE—Abduction.—Under Rev. St

Ind. 1881, § 1993, an allegation in an information that the enticing was done "with the felonious intent of rendering [the person enticed] a prostitute" was equivalent to alleging that it was done "for the purpose of prostitution."—*Nichols v. State*, Ind., 26 N. E. Rep 839.

35. CRIMINAL PRACTICE—Allegations as to Time.—In an indictment for an offense not punishable with death it is material to allege that it was committed within two years from the finding of the indictment, and this allegation must be established by proof on the trial.—*Warrace v. State*, Fla., 8 South. Rep. 748.

36. CRIMINAL PRACTICE--False Pretenses.—An indictment against the agent of an insurance company for obtaining money under false pretenses by sending a fictitious application, upon the acceptance of which a commission was to be paid him, is demurrable, unless it distinctly alleges that the company was deceived by the application, and thereby accepted it, and paid defendant money by reason thereof.—*Commonwealth v. Dunleay*, Mass., 26 N. E. Rep. 870.

37. CRIMINAL PRACTICE — Presumptions.—Where the charge to the jury in a prosecution for felony was given orally, it will be presumed on appeal, in the absence of a contrary showing, that it was taken down by the phonographic reporter, as required by Pen. Code Cal. § 1093, subd. 6.—*People v. Barton*, Cal., 25 Pac. Rep. 1117.

38. CRIMINAL PRACTICE—Prostitution. — An information alleging that defendant unlawfully took away a certain unmarried female under the age of 18 years from the custody of her mother, without the latter's consent, and against her will, for purpose of prostitution, is sufficient under Pen. Code Cal. § 267, without alleging that the female's mother had "legal charge" of her person.—*People v. Fowler*, Cal., 25 Pac. Rep. 1110.

39. CRIMINAL PRACTICE—Robbery.—In an information for robbery, that follows the language of the statute, it is not necessary to use the word "rob," or the words "to rob." The statute defining the various degrees of robbery does not contain these words.—*State v. Ready*, Kan., 26 Pac. Rep. 58.

40. DEED—Estate Conveyed.—A deed will not be construed to create an estate upon condition, unless the language to that effect is so clear that no room is left for any other construction.—*Ruggles v. Clare*, Kan., 26 Pac. Rep. 25.

41. DEFECTIVE DRAIN COVERS.—A city is not liable for injuries caused by a defective covering to a drain, unless it is shown that it had notice of the defect, or that the defect had existed for such time that the city authorities, exercising proper diligence, would or should have known of its existence.—*City of Galveston v. Smith*, Tex., 15 S. W. Rep. 599.

42. DELIVERY—Chattel Mortgage.—Delivery of a chattel mortgage to the town clerk for him to record, and then forward it to the mortgagee, constitutes a valid delivery.—*Commonwealth v. Cutler*, Mass., 26 N. E. Rep. 855.

43. DESCENT AND DISTRIBUTION. — Under Elliott's Supp. Ind. § 423, and Rev. Stat. Ind. 1881, § 2347, where all a decedent's lands are, with the widow's consent, sold to pay his debts, that part of the purchase money which represents the value of his heirs' reversionary interest in the widow's share of the land should go to them free from liability for his debts.—*Windell v. Trotter*, Ind., 26 N. E. Rep. 823.

44. DESCENT AND DISTRIBUTION—Exemption.—An heir, against whom the administrator of his ancestor's estate has recovered judgment in an amount greater that his distributive share of the estate, has no right, while such judgment remains unsatisfied, to any share in such estate, even though his entire property is not equal in value to the amount of his legal exemptions.—*Fiscus v. Fiscus*, Ind., 26 N. E. Rep. 831.

45. DESCENT—Liabilities of Heirs.—The district court jurisdiction to subject real estate which the heir at law or devisee has inherited from his father, for the debt of the father, where there has been no administration of the estate, and where there are no other debts or claims against the estate.—*McLean v. Webster*, Kan., 26 Pac. Rep. 10.

46. DIVORCE—Affidavit.—The affidavit required to be made and filed by plaintiff in a divorce proceeding, under section 640 of the Civil Code, stating that the residence of the defendant is unknown and cannot be ascertained by any means within the control of plaintiff, forms no part of the constructive service, but is only intended as evidence tending to show that due service has been made.—*Ensign v. Ensign*, Kan., 26 Pac. Rep. 7.

47. DRAINAGE—Repairs—Assessments.—Under Elliott, Supp. Ind. St. 1889, § 1193, the circuit court can hear evidence showing that the ditch was not repaired on the line designated in the original specifications, but on a different one.—*Taylor v. Brown*, Ind., 26 N. E. Rep. 822.

48. EMINENT DOMAIN—Compensation.—The opinion of a witness, giving in the lump the amount of damages, present and prospective, which a land owner will sustain by the appropriation of a right of way for a railroad through his land, is not admissible as evidence.—*Chicago, etc. Ry. Co. v. Neiman*, Kan., 26 Pac. Rep. 22.

49. EMINENT DOMAIN—Compensation.—Upon the question of damages for the appropriation of land in condemnation proceedings, evidence of the price previously offered the land owner taker for the land is inadmissible. — *Minnesota Belt-Line Ry. Transfer Co. v. Gluek*, Minn., 48 N. W. Rep. 194.

50. EMINENT DOMAIN — Constitutional Law.—In proceedings begun by plaintiff in 1885, to condemn land, defendants were entitled to have the amount of their compensation ascertained by a jury, though the railroad company was organized under the laws of Missouri of 1857, which provides for compensation to be ascertained by viewers.—*St. Joseph, Iowa R. Co. v. Cudmore*, Mo., 15 S. W. Rep. 535.

51. EMINENT DOMAIN—Railroad in Street.—To entitle an abutting lot-owner to recover damages for locating a line of railroad, under the authority of the city council, in one of the streets, of a city, there must be a practical obstruction of the street in front of his premises, so as to virtually deprive him of ingress to and egress from his property.—*Kansas, etc. R. Co. v. Mahler*, Kan., 26 Pac. Rep. 22.

52. ESTATE—Nature.—A deed executed for a valuable consideration conveyed lands in trust for the sole and separate use of A and the heirs of her body, with remainder in fee to her husband, if he should survive her and she should die without leaving issue: *Held*, that under such deed A took an equitable estate in fee-tail, which was cut down to a life-estate in her by Rev. St. Mo. 1889, § 8836.—*Wood v. Kice*, Mo., 15 S. W. Rep. 623.

53. ESTOPPEL — Mortgage — Foreign Corporations.—Though Const. Ala. 1875, art. 14, § 4, declares that "no foreign corporation shall do any business in this State without having at least one known place of business, and an authorized agent therein," one who takes a mortgage which is expressly made subject to a mortgage on the same land to a foreign corporation is estopped to deny the validity of such prior mortgage because the mortgagee has not a place of business in this State.—*Pratt's Ex'r v. Nixon*, Ala., 8 South. Rep. 751.

54. EXECUTION—Exemptions.—Money in the hands of the sheriff, which has been recovered by a debtor as damages for the sale under execution of his exempt property, cannot be applied by the sheriff to the satisfaction of an execution in his hands against the debtor.—*Howard v. Tandy*, Tex., 15 S. W. Rep. 578.

55. EXECUTION—Levy.—Though by section 3646 of the Code a sheriff who has levied an execution upon heavy machinery, such as a planing-machine, is authorized to sell it without removing it from the premises where it is seized, and conveying it to the place of sale, this does not relieve him from the duty of maintaining his custody and possession of such property until he disposes of it by a legal sale.—*O'Pry v. Kennedy*, Ga., 12 S. E. Rep. 940.

56. FORECLOSURE—Appearance by Attorney. — In a foreclosure proceeding against a non-resident defendant, who employs an attorney authorized to practice in the court in which the case is pending to take charge n his case, without limiting his authority, and such attorney makes a general appearance, *held* that such appearance binds the defendant, and gives the court jurisdiction over his person.—*Clark v. Lilliebridge*, Kan., 26 Pac. Rep. 43.

57. FRAUDS, STATUTE OF — Assumption of Debt. —A purchaser who accepts a conveyance of real property, reciting that there is a mortgage lien thereon, which the purchaser assumes to pay, cannot avoid the payment of such lien by a claim that it was a verbal promise to pay, and void by the statutes of fraud.—*Neiswanger v. McClellan*, Kan., 26 Pac. Rep. 18.

58. FRAUDS, STATUTE OF —Co-tenants. — Where a tenant in common makes separate oral contracts with each of his co tenants for the purchase of their interest in part of the land, the execution of such contracts by some of the co-tenants is not such a part performance of the contract with a co-tenant who refuses to convey as would take the contract with him out of the statute of frauds.—*Graves v. Goldthwait*, Mass., 26 N. E. Rep. 860.

59. FRAUDS, STATUTE OF — Memorandum.—A memorandum for the sale of land that does not name the purchaser is insufficient.—*Lewis v. Wood*, Mass., 26 N. E. Rep. 862.

60. FRAUDS, STATUTE OF — Sale — Memorandum. — A memorandum of a sale, which neither names nor describes the sellers, is not sufficient to satisfy the statute of frauds.—*McGorern v. Hern*, Mass., 26 N. E. Rep. 861.

61. FRAUDULENT CONVEYANCES—Unmatured Note.—A bill in equity to set aside a deed as fraudulent, and subject land to the payment of two notes, one of which is not due, is demurrable so far as it seeks to subject the land to the unmatured note.—*Freider v. Leinkauff*, Ala., 8 South. Rep. 758.

62. HUSBAND AND WIFE—Property of Wife.—In an action to subject to the debts of a husband property claimed by his wife, it appeared that the wife had been made a *feme sole* by decree of court; that at the time of the decree she owned no property at all; that the husband bought goods and conducted business in her name, and realized large profits therefrom; and that he was a man of superior business capacity: *Held*, that the property was subject to the husband's debts.—*Carter v. Martin*, Ky., 15 S. W. Rep. 652.

63. INJUNCTION—Costs.—On the dissolution of an injunction, prayed as auxiliary to the relief of specific performance of a contract to convey land, counsel fees may be allowed, in Missouri, to defendants, though they made no motion to dissolve the injunction, but defended on the merits against the specific performance. —*Brownlee v. Fenwick*, Mo., 15 S. W. Rep. 611.

64. INJUNCTION—Dissolution.—Where a temporary injunction is granted without notice by a probate judge, in the absence of the district judge, the defendant at any time before the trial, may apply, upon notice, to the district judge to vacate the same.—*Kemper v. Campbell*, Kan., 26 Pac. Rep. 53.

65. INJUNCTION—Vendor and Vendee.—A vendee who has bought land subject to a mortgage, which the vendor has agreed to pay, and who has given his note for the purchase money, is, when sued on such note, entitled to an injunction restraining the execution of judgment in such suit until the vendor has paid the mortgage debt, where a decree of foreclosure has been rendered on the mortgage, and the vendor is insolvent. —*Gillett v. Sullivan*, Ind , 26 N. E. Rep. 827.

66. INSURANCE—Insurable Interest.—A tenant in common who has purchased the interest of his co-tenant and paid the consideration under an oral agreement, though he has not received a deed, has an insurable interest in the entire property.—*Wainer v. Milford Mut. Fire Ins. Co.*, Mass., 26 N. E. Rep. 877.

67. INTOXICATING LIQUORS — Complaint. — The complaint need not necessarily be made by the town treasurer, under Pub. St. ch. 27, § 106, and a complaint for the maintenance of a liquor nuisance by a private individual is good.—*Commonwealth v. Gay*, Mass., 26 N. E. Rep. 852.

68. INTOXICATING LIQUORS—Evidence. — Where, in a prosecution under the prohibitory law of this State for selling intoxicating liquor for an unlawful purpose, the State elects to rely on a sale made on the 6th of April, evidence of other sales on other days may be given to the jury for the purpose of showing that the liquor was not needed for medical purposes, but was wanted for use as a beverage.—*State v. Elliott*, Kan., 26 Pac. Rep. 55.

69. INTOXICATING LIQUORS—Sale by Agent.—One who unlawfully sells liquor, as clerk or agent for a wholesale liquor dealer, without a license, may be convicted of carrying on the business of a wholesale liquor dealer without a license, though he has no pecuniary interest other than as agent or clerk.—*Abel v. State*, Ala., 8 South. Rep. 760.

70. JUDICIAL SALES—Decree for Alimony.—The claim for alimony in a wife's bill for divorce is not a debt; and a sale of the husband's lands under a decree, directing one half the proceeds to be paid over to the wife as alimony, is not a sale made to satisfy a debt, and is not subject to redemption, under Code Tenn. § 2124.—*White v. Bates*, Tenn., 15 S. W. Rep. 651.

71. JUDGMENT—Collateral Attack —Where a sale in partition proceedings has been confirmed by the court, the title thereby conveyed cannot be collaterally attacked, even though the sale was fraudulently made by the commissioner.—*McLeod v. Applegate*, Ind., 26 N. E. Rep. 830.

72. JUDGMENT—Evidence. — Rev. St. Tex. art. 4339, which requires every judgment by which title to land is recovered to be recorded in the county where the land lies before it shall be "received in evidence in support of any right claimed by virtue thereof," does not render such a judgment, when not so recorded, incompetent evidence of title where it is not sought to charge a subsequent innocent purchaser with constructive notice of it.—*Callahan v. Hendrix*, Tex., 15 S. W. Rep. 593.

73 LEASE—Renewal.—Where a written lease of real estate for one year contains the following stipulation, "And the said party of the second part [the lessee] has the privilege of continuing this lease, provided he fulfills the contract, at the same rent," *held*, that the lessee has the privilege of having the lease renewed for another year.—*Lyons v. Osborne*, Kan., 26 Pac. Rep. 31.

74. LIEN—Laborers — Street Railways.—Under Code Wash. ch. 138, § 1957, giving a laborer's lien upon a "railroad" or "any other structure," and the land upon which it is erected, laborers cannot have a lien upon a street cable railway since there can be no lien upon the land, the fee of the street being in the city.—*Front St. Cable Ry Co. v. Johnson*, Wash., 25 Pac. Rep. 1084.

75. LIMITATION — Ejectment — Adverse Possession. — Since there is no statute of Colorado on the subject of title by adverse occupation, and the common law as it stood in the fourth year of James I. has been adopted, (Gen. St. Colo. p. 170), 21 years' adverse possession of land is no bar to ejectment by the holder of the fee simple title.—*Latta v. Clifford*, U. S. C. C. (Colo.), 45 Fed. Rep. 108.

76. LIMITATIONS — Infringement of Patent.—A state statute of limitations is not pleadable in bar of an action at law for infringement of a patent.—*McGinnis v. Erie County*, U. S. C. C. (Penn.), 45 Fed. Rep. 91.

77. MANDAMUS — Election Contests.—A motion for a peremptory *mandamus* to compel defendant, as county clerk, to issue to relator a certificate of his election to the office of prosecuting attorney of the county, and to certify the vote to the secretary of State, will be denied, where it appears that the defendant had in due form canvassed the vote and issued a certificate of the election of relator's opponent, to whom the governor had issued and delivered a commission.—*State v. Smith*, Mo., 15 S. W. Rep 614.

78. MANDAMUS—When Granted.—A peremptory writ of *mandamus* will be refused when it is evident that it would be without beneficial results, and fruitless to the relator.—*State v. Board of County Commissioners*, Fla., 8 South. Rep. 749.

79. MASTER AND SERVANT—Fellow-servant.—Where one employee is in charge of a certain part of defendant's railway business, as, in this case, of a round-house, he is not to be regarded as a fellow servant of a laborer working at the time under his orders, in respect of acts done by the former in pursuance of his authority over the branch of business under his charge.—*Dayharsh v. Hannibal, etc. R. Co.*, Mo., 15 S. W. Rep. 554.

80. MASTER AND SERVANT—Negligence.—A mason who is injured by the tipping of a staging on which he is obliged to stand while at work, which staging consists simply of barrels standing on end with planks laid across them, and which is constructed by a laborer employed by the common master to assist the mason, can not recover from the master for his injuries, either at common law or under the employers' liability act (St. Mass. 1887, ch. 270).—*O'Connor v. Neal*, Mass., 26 N. E. Rep. 857.

81. MECHANICS' LIENS—Contract of Purchase.—Under Sayles, St. Tex. art. 3164, no lien can arise under a contract to erect building, for one who is in possession of land with the right to purchase it by a given time, but who fails to complete the purchase.—*Galveston Exhibition Ass'n v. Perkins*, Tex., 15 S. W. Rep. 633.

82. MECHANICS' LIENS—Evidence.—Where plaintiffs have introduced evidence that the work for which they claim a lien was well done, defendants are entitled to show that it was not done in a good and workman like manner.—*Hagman v. Williams*, Cal., 25 Pac. Rep. 1111.

83. MECHANICS' LIENS—Fencing Material.—To entitle a person to a lien upon land for material furnished for fencing, it must appear, not only that such material was purchased to be used for that purpose, but it must also appear that the same was in fact so used as to become a part of the realty.—*Hill v. Bowers*, Kan., 26 Pac. Rep. 13.

84. MECHANICS' LIENS—Pleading.—Where two separate buildings are constructed at different times, under different contracts between the owner and the same contractor, a mechanic's lien may be jointly filed against both, without specifying the amount due on each.—*Booth v. Pendola*, Cal., 25 Pac. Rep. 1101.

85. MORTGAGES—Foreclosure.—The foreclosure of a first mortgage, under which the mortgagee takes possession of the land, does not cancel the mortgage debt, as against the mortgagee and his grantees, so as to entitle the owners of a second mortgage to foreclose without paying for it.—*Osborne v. Taylor*, Conn., 21 Atl. Rep. 980.

86. MORTGAGES—Junior Mortgagee.—A senior incumbrancer is not bound to respect the equitable rights of a junior incumbrancer in the property unless he has notice, either actual or constructive, of such rights. The recording of the junior mortgage is not constructive notice to the prior mortgagee of the existence of such mortgage.—*Sarles v. McGee*, N. Dak., 48 N. W. Rep. 231.

87. MUNICIPAL BONDS—Validity—Estoppel.—Where bonds are issued under a statute which also confers power to levy a certain tax to meet them, a party who admits their validity cannot dispute the legality of the tax sanctioned by the same law.—*State v. Maslin*, Mo., 15 S. W. Rep. 529.

88. MUNICIPAL CORPORATION—Streets.—Under Pub. St. Mass. ch. 52, § 15, a town which has raised the grade of a street so as to impede access to the adjoining property, and to cause surface water to flow on and remain upon said property, is liable for the damage thereby caused.—*Woodbury v. Inhabitants of Beverly*, Mass., 26 N. E. Rep. 851.

89. MUNICIPAL CORPORATION—Street Improvements—Grade.—Where the grade of a street is raised, the abutting property owners are not entitled to recover as damages the amount it would cost to fill their land up to the new grade, nor for loss and inconvenience in the prosecution of their business caused by increased difficulty of access.—*Chambers v. Borough of South Chester*, Penn., 21 Atl. Rep. 409.

90. MUTUAL BENEFIT INSURANCE.—Under Acts Mass. 1882, ch. 195, § 2, a certificate may be made payable to a member's *fiancee*, who is supported partly by her own labor and partly by money paid her by such member, though he is under no legal obligation to make such payments.—*McCarthy v. New England Order of Protection*, Mass., 26 N. E. Rep. 866.

91. NEGLIGENCE.—A heavy sign having been placed over a sidewalk in a much-frequented part of the city, negligence is presumed from a fall of the sign because of the fastenings proving insufficient to hold it under ordinary circumstances.—*St. Louis, etc. Ry. Co. v. Hopkins*, Ark., 15 S. W. Rep. 611.

92. NEGLIGENCE—Proximate Cause.—Defendant allowed a division fence which he was bound to maintain to become insufficient, and plaintiff's colt thereby crossed to defendant's land, and died. There was a broken rail near the colt, and the ground was broken slightly where it had struggled to rise: *Held*, that the natural depression in the ground, and not the insufficiency of the fence, was the proximate cause of the colt's death.—*Fales v. Cole*, Mass., 26 N. E. Rep 872.

93. NEGOTIABLE INSTRUMENT—Cancellation on Condition.—Where, upon the execution of a promissory note, and payee, as part of the contract, indorsed an agreement upon the note whereby it was promised and agreed that, in case the maker of the note should erect a dwelling-house upon the lot therein described on or before a certain date, the note should be cancelled, *held*, that the right to cancel the note in this way was a privilege or option to be exercised within the time limited.—*Stout v. Watson*, Minn., 48 N. W. Rep. 195.

94. NEGOTIABLE INSTRUMENT—Consideration—Bail-bond.—Plaintiff, at defendant's request, signed a bond to replevy a judgment against defendant's son for a fine and costs, whereby the son obtained a stay of execution for five months, the bond being also signed by defendant. The son had been released from custody before the bond was signed. At the end of the five months, plaintiff paid the amount due on the judgment: *Held*, that the execution of the bond, and the payment by plaintiff, constituted a good consideration for a note by defendant to plaintiff for the amount so paid.—*Davis v. Meisner*, Ind., 26 N. E. Rep. 829.

95. NEGOTIABLE INSTRUMENT—Mistake in Date.—A promissory note intentionally post dated or antedated, though a valid contract from the time of its delivery, will be construed as it reads, for such is the contract.—*Almich v. Downey*, Minn., 48 N. W. Rep. 197.

96. NEW TRIAL—Third Verdict.—Under Code Tenn. § 3122, providing that "not more than two new trials shall be granted to the same party in an action at law, or upon trial by jury of an issue of fact in equity," a third verdict cannot be set aside if there is any legitimate evidence to support it, even though the trial judge is of opinion that the weight of the evidence is against it.—*East Tennessee, etc. Ry. Co. v. Mahoney*, Tenn., 15 S. W. Rep. 652.

97. PARTITION.—A party owning an undivided half of an improved city lot, having acquired title to it from a person who had been exercising acts of ownership, paying taxes, building sidewalks, and receiving small sums for its use for 24 years, can maintain an action for partition of it against the owners of the other undivided half, who, at the trial, do not show that, before the commencement of the suit, they absolutely denied or distinctly repudiated the interest of the plaintiff in the partition proceedings.—*Jockheck v. Davies*, Kan., 26 Pac. Rep. 36.

98. PARTNERSHIP—Retiring Partner.—Where several tenants in common of a mine employ a manager to work and extract the ores therefrom and account to

the owners for the proceeds, thus forming a mining co-partnership, though not for a fixed or definite period, one of the owners may withdraw from such enterprise without dissolving such copartnership as to the other tenants.—*Slater v. Haas*, Colo., 25 Pac. Rep. 1089.

99. PLEDGE—Rights of Pledgee. — Where stock is pledged to secure a note and any other liabilities of the pledgeor to the pledgee, and the same stock is afterwards pledged to the same party to secure a second note and any other liabilities of the pledgeor to the pledgee, the proceeds of such stock when sold by the pledgee, may be applied by him in payment of other notes of the pledgeor to him in preference to the notes specified.—*Fall River Nat. Bank v. Slade*, Mass., 26 N. E. Rep. 843.

100. QUIETING TITLE—Jury Trial.—Under Const. Cal. art. 1, § 3, in an action to quiet title under Code Civil Proc. Cal. § 738, defendant is entitled to jury trial on the issues of prior possession and ouster. — *Donahue v. Meister*, Cal., 25 Pac. Rep. 1096.

101. RAILROAD COMPANIES—Crossings.— In an action against railroad company for personal injuries at a crossing, it was held on the facts that plaintiff was guilty of contributory negligence.—*Mann v. Belt R. R., etc. Co.*, Ind., 26 N. E. Rep. 819.

102. RAILROAD COMPANIES—Killing Stock.—It is the duty of a railroad company operating a railroad to see that the proper cattle-guards exist wherever the track of the operated railroad enters or leaves inclosed or fenced land, whether such railroad company owns or is operating the railroad under a lease.—*Missouri Pac. Ry. Co. v. Ricketts*, Kan., 26 Pac. Rep. 50.

103. RAILROAD COMPANIES—Killing Stock.—Whenever it is shown that a railroad has not been fenced, and that an animal has passed upon the track and been killed or injured, a *prima facie* case has been made out against the company.—*Missouri Pac. Ry. Co. v. Baxter*, Kan., 26 Pac. Rep. 49.

104. REAL ESTATE AGENTS—Exchange—Commissions. —The fact that a real estate agent is acting for one principal, whose farm he has for sale, will not prevent his recovery of commissions from another, who employs him to effect an exchange of city property for the farm, which the agent does by bringing the principals together.—*Cox v. Hann*, Ind., 26 N. E. Rep. 822.

105. REMOVAL OF CAUSES — Jurisdiction. — A suit brought by the State railroad commissioners to compel a railway company to obey the regulations of the commissioners cannot be removed to the federal courts, even though the parties are citizens of different States, and the answer raises a federal question, since such a suit, being in effect an attempt by the State to execute its laws, could not have been originally brought in a federal court.—*Dey Railroad Commissioners v. Chicago, etc. Ry. Co.*, U. S. C. C. (Iowa), 45 Fed. Rep. 82.

106. REMOVAL OF CAUSES—Remand.—Where a petition for removal is not filed at the time or before defendant is required by the State practice to plead to the declaration or complaint, as provided in Act Cong. March 3, 1875, the case must be remanded to the State court, whether motion to that effect be made or not.—*Bowers v. Supreme Council*, U. S. C. C. (Cal.), 45 Fed. Rep. 81.

107. REPLEVIN—Action on Bond. — Where goods in the hands of an officer under execution have been replevied by a third person, it is no defense to an action on the replevin bond, that the execution debtor was entitled to the goods as exempt.—*Capen v. Bartlett*, Mass., 26 N. E. Rep. 873.

108. REPLEVIN—Demurrer to Evidence. — Where an action in replevin is tried by the court without a jury, and a demurrer to the evidence is interposed, and there is some evidence tending to establish the issues made by the pleadings, such demurrer should be overruled. —*Benninghoff v. Cubbison*, Kan., 26 Pac. Rep. 14.

109. REPLEVIN—Evidence.—A corporation composed of Odd-Fellows rented rooms to voluntary associations of Odd-Fellows, and in these rooms was placed furniture purchased with the proceeds of an Odd Fellow, fair: *Held*, that the corporation, though it did not claim absolute ownership of the furniture, might replevy it from the trustees of the voluntary associations, who had removed it.—*Odd-Fellows' Hall Ass'n v. McAllister* Mass., 26 N. E. Rep. 863.

110. REPLEVIN—Judgment. — Where plaintiffs obtain possession of property in an action in replevin against a sheriff for goods taken on execution, and the jury finds for the defendant, the verdict and judgment should be in the alternative for a return of the property, or the amount of the special interest of the officer in the goods, in case a return cannot be had.—*Ponceler v. Marshall*, Kan., 26 Pac. Rep. 32.

111. RES ADJUDICATA.—The dismissal of an action in the nature of a bill in equity, for want of prosecution only, is not a final and conclusive adjudication on the merits.—*Mills v. Pettigrew*, Kan., 26 Pac. Rep. 33.

112. RES ADJUDICATA—Probate Decree.—A decree of the probate court ordering the account of an administrator with the will annexed to be reopened, which is based on the ground that the petitioner therefor is the sole heir of the testator, who devised his realty to his heirs at law, is not conclusive or admissible evidence of that fact, against prior grantees of the supposed heirs, in a subsequent action for the land by the petitioner against such grantees.—*Shores v. Hooper*, Mass., 26 N. E. Rep. 846.

113. SCHOOL FUNDS—Loans—Sureties.—A person who signs as surety, after delivery, a bond under seal given to secure a loan of school moneys, cannot escape liability by showing that no order requiring additional security was entered of record without showing that there was no other consideration, as the seal imports a consideration.—*Montgomery County v. Auchley*, Mo., 15 S. W. Rep. 626.

114. SHERIFF—Service by Coroner.—Where a summons is directed to the sheriff of a county, it is irregular for the coroner of the county to receive and serve it.—*Pelham v. Edwards*, Kan., 26 Pac. Rep. 41.

115. SPECIFIC PERFORMANCE.—Courts of equity will not decree specific performance of contracts containing continuous covenants, the enforcement of which might require the constant supervision of a court; nor will they enforce specific performance of contracts, every alleged violation of which would require the consideration and determination of questions of fact.—*Kidd v. McGinniss*, N. Dak., 48 N. W. Rep. 221.

116. SPECIFIC PERFORMANCE—Statute of Frauds.—A parol contract for the sale of land, by which the vendor agreed to convey when his title was perfected, will be specifically enforced after his death, at the suit of his personal representatives, who have perfected the title, where the vendee, who went into possession under the contract, made improvements on the land, and paid part of the purchase money during the vendor's lifetime.—*Appeal of Simmons*, Penn., 21 Atl. Rep. 402.

117. STATUTES—Enactment.—In cases where the constitution requires the yeas and nays to be entered upon the journal of either branch of the legislature upon the passage of a bill, such requirement is mandatory.—*Lincoln v. Haugen*, Minn., 48 N. W. Rep. 196.

118. TAXATION—Equalization. — Under Rev. St. Mo. 1879, § 6672, giving to county boards of equalization power to equalize the valuation on all real and personal property within the county, and making it the duty of the board to equalize the valuation of all such property, so that each tract of land shall be entered on the tax-book at its true value, the board may raise the assessed value of the real estate in townships by a single order, on a per centum basis for each township, where, in their judgment, the assessed value is such per cent. below the true value.—*Black v. McGonigle*, Mo., 15 S. W. Rep. 615.

119. TAX DEED—Rights of Purchaser. — Under the Kansas City charter, §§ 64, and 65, a tax-deed is adjudged invalid because not "executed substantially as provided for in the preceeding section" the grantee therein may recover purchase money, taxes, etc., paid

by him.—*Birmingham v. Birmingham*, Mo., 15 S. W. Rep. 533.

120. TAXES—Public Lands.—Chapter 39, Sess. Laws 1877, relating to the collection of delinquent taxes on real estate bid off by counties and cities at tax-sales, is to be understood as referring to real estate where "taxes are due and unpaid," and not as including real estate belonging to the United States, and therefore not liable for taxation.—*Doty v. Bassett*, Kan., 26 Pac. Rep. 52.

121. TELEGRAPH COMPANIES—Delay—Damages.—The delay of a telegraph company in delivering a telegram to an attorney, requesting him to take the first train for a neighboring town, but which telegram contained nothing to show why he was wanted at that place, or what injuries would result to him from the delay in delivery, does not enable him to recover the attorney's fees which he might have earned had the dispatch been seasonably delivered.—*Western Union Tel. Co. v. Clifton*, Miss., 8 South. Rep. 746.

122. TOWNS—Boundaries.—Where one town is set off by the legislature from the territory of another town, the boundary between them being a stream of water, the center of the stream is the dividing line between the two.—*Flynn v. City of Boston*, Mass., 26 N. E. Rep. 868.

123. TRADE-MARK—Assignment.—Where the proprietor of a medicine transfers the right to use his trade-mark and formulas without transferring the place of manufacture, or plant used, or the good-will of the business, and there is no exclusive right to manufacture the medicine in any one, and there is nothing in the trade-mark to indicate that the medicine comes from a particular manufactory, the grantee cannot restrain another person from using it.—*Covell v. Chadwick*, Mass., 26 N. E. Rep. 855.

124. TRESPASS—Measure of Damages.—Plaintiffs were in possession as lessees of a building which they used as a barber-shop, when, by reason of defendants' trespass, the building was rendered unfit for such purpose, and they were compelled to move, losing thereby a hot-water privilege which they had purchased: *Held*, that they were entitled to damages for loss of the water privilege, the value of permanent improvements abandoned, expense of removal, and loss in their business, under Civil Code Cal. § 3333.—*Hawthorne v. Siegel*, Cal., 25 Pac. Rep. 1114.

125. TRIAL—Instructions.—The instructions of the trial court are the law of the case, for the jury to obey and follow. A finding against the instructions of the court cannot constitute any portion of a judgment.—*Florence, etc. R. Co. v. Pember*, Kan., 26 Pac. Rep. 1.

126. TRIAL—Instructions.—The refusal to give instructions asked is not assignable as error where the record does not affirmatively show that they were signed by the party or his attorney, or that they were presented before the argument began.—*Craig v. State*, Ind., 26 N. E. Rep. 842.

127. TRIAL—Reception of Evidence.—Where defendant has introduced evidence to contradict plaintiff's evidence in chief, plaintiff may, in rebuttal, introduce testimony tending to confirm his testimony in chief, and it is not objectionable as being merely cumulative.—*San Antonio, etc. Ry. Co. v. Robinson*, Tex., 15 S. W. Rep. 584.

128. TRIAL—Verdict — Special Findings. — Where a special verdict, including findings upon particular issues, is rendered, and there is no general verdict, it must be responsive to all the issues.—*Crick v. Williamsburg City Fire Ins. Co.*, Minn., 48 N. W. Rep. 198.

129. TRIAL BY COURT — Equitable Defenses.—In an action for the recovery of possession of personal property, an answer claiming that defendant is the owner of the property, and further setting up a counter-claim for damages for conspiracy and deceit, presents no equitable defense justifying the court in proceeding to try it in advance of a trial of the issues at law.—*Swasey v. Adair*, Cal., 25 Pac. Rep. 1119.

130. TRUST—Power.—A conveyance of land to a trustee to apply the yearly income, rents, and profits to the grantor's use for life, free from the control of her husband, being recognized as a valid trust by 1 Rev. St. N. Y. p. 728, § 55, subd. 3, vests the whole legal and equitable estate in the trustee, subject only to the execution of the trust imposed.—*Townshend v. Frommer*, N. Y., 26 N. E. Rep. 805.

131. VENDOR AND VENDEE—Fraudulent Representations.—Defendants sold to plaintiff land and stock in a water company, representing that the water supply to which the stock entitled him was sufficient to irrigate the land and render it capable of producing crops: *Held*, that the representation was not a mere expression of opinion, but a material statement.—*Hill v. Wilson*, Cal., 25 Pac. Rep. 1105.

132. VENDOR AND VENDEE—Quitclaim.—Defendant's grantor executed an instrument by which he released and quitclaimed to defendant land on which he had only a school-land certificate of purchase, and by which he further agreed to perfect his title, and make defendant a good deed: *Held*, that the instrument was a quitclaim deed and conveyed all the grantor's interest.—*Wholey v. Cavanaugh*, Cal., 25 Pac. Rep. 1112.

133. VENDOR'S LIEN—Consideration.—Where a defendant, who has orally sold land to plaintiffs, induces plaintiffs to resell to him, and to take in part payment property that did not pass by the first sale, such release constitutes a good consideration for notes given for the balance of the purchase money, and which are made a lien on the land, even though the legal title was conveyed to defendant by a third person at plaintiff's request.—*Busby v. Bush*, Tex., 15 S. W. Rep. 638.

134. VENDOR'S LIEN—Parties.—In a suit to foreclose a vendor's lien, persons who owned an interest in the land, but who did not join the deed and were not named in the note given in payment, are not necessary parties.—*Earl v. Marx*, Tex., 15 S. W. Rep. 595.

135. WARRANTY—Action for Breach.—In an executory contract for the sale of personal property, the vendor may warrant the quality of the goods contracted to be sold, and such warranty will have the binding force of a warranty upon a sale *in præsenti*, and no greater.—*Halley v. Folsom*, N. Dak., 48 N. W. Rep. 219.

136. WARRANTY—Release of Bond.—A cross-complaint which alleges that plaintiff sold defendant his business, warranting it to be of a certain value; that defendant paid therefor by note; that, when it was afterwards discovered that the business was worth less than warranted, the parties cancelled the contract, and the note was returned to defendant; and that defendant had been damaged by such breach of warranty,—states no cause of action.—*Kempshall v. East*, Ind., 26 N. E. Rep. 836.

137. WILLS—Construction.—A devise of "all my estate, both real and personal, that I shall inherit as my portion after my father's death," carries the title to lands inherited from testatrix's mother, and subject to an estate by the curtesy in her father, when these were all the lands she owned.—*Graham v. Knowles*, Penn., 21 Atl. Rep. 398.

138. WILLS—Establishment.—This proceeding to establish a will, while technically at law, is so far equitable in its nature that, where an unincorporated association is a devisee under such will, some of its members may sue, on behalf of all to establish it.—*Lilly v. Tobbein*, Mo., 15 S. W. Rep. 618.

139. WILLS—Lost Wills—Revocation.—A will, lost or destroyed in the life-time of the testator, who had knowledge of such loss or destruction, is not subject to probate.—*Appeal of Deaves*, Penn., 21 Atl. Rep. 893.

140. WITNESS — Transactions between Decedents. — Under St. Nev. 1881, p. 80, defendant, in a suit by a surviving partner to foreclose a mortgage, cannot testify that the deceased partner accepted property under a verbal agreement in satisfaction of the mortgage.—*Gage, v. Phillips*, Nev., 26 Pac. Rep. 60.